TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 111

THE UNITED STATES OF AMERICA, PETITIONER,

v.

JAMES J. JOHNSTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR CERTIORARI FILED JULY 6, 1935
CERTIORARI AND RETURN FILED NOVEMBER 18, 1935

(29725)

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INDEX

1 In United States District Court

Writ of error

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of plea which is in the district court, before you, or some of you, between the United States of America and James J. Johnston, a manifest error hath happened, to the great damage of the said James J. Johnston, as is said and appears by his complaint, we, being willing that such error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place before the judges aforesaid on the fourth day of January, 1922, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the Second Circuit may cause fur-
2 ther to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this day of December, in the year of our Lord one thousand nine hundred and twenty-one, and of the Independence of the United States the one hundred and forty-

[SEAL] (Signed) ALEX GILCHRIST, Jr.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

(Signed) WILLIAM C. VAN FLEET,
United States District Judge.

3 In United States District Court for the Southern District of New York

THE UNITED STATES OF AMERICA
against
JAMES J. JOHNSTON, DEFENDANT

Petition for and order allowing writ of error

James J. Johnston, the defendant herein, feeling himself aggrieved by the verdict of the jury and the judgment entered on the

5th day of December, 1921, comes now by his attorney and petitions this court for an order allowing the defendant to prosecute a writ of error to the honorable the judges of the Circuit Court of Appeals of the United States for the Second Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of the said writ of error by the said Circuit Court of Appeals of the United States for the Second Circuit.

Wherefore this defendant prays for the allowance of a writ
4 of error and for an order fixing the amount of said bond and for such further orders and process as may cause the errors complained of to be corrected by the said Circuit Court of Appeals of the United States for the Second Circuit, and that said verdict, judgment, and sentence be set aside, and your petitioner will ever pray, etc.

Dated November 30th, 1921.

GEORGE E. COUGHLIN
AND
ARTHUR N. SAGER,
Attorneys for Defendant.

5 [Title omitted.]

This the 6th day of December, 1921, came the defendant, by his attorney, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant giving bond, according to law, in the sum of two thousand ($2,000) dollars, which shall operate as a supersedeas bond.

(Signed) WM. C. VAN FLEET,
United States District Judge.

6 In United States District Court

Indictment

In the District Court of the United States of America for the Southern District of New York

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the

Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, on the 31st day of March, 1921, in the Southern District of New York and within the jurisdiction of this court, James J. Johnston unlawfully, knowingly and wilfully failed and refused to account for and pay over to the United States the sum of $618.00, being the amount of excise taxes due and payable to the United States under the provisions of Title VIII of the act of February 24, 1919, known as the revenue act of 1918, upon money received by the said James J. Johnston in payment of admissions, the said offense being more particular described as follows:

That on February 28, 1921, the said defendant conducted a boxing contest in the building known as the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the admission fees paid by persons attending the said contest amounting to the sum of $6,180.00, and there was due to the United States under the provisions of the revenue act of 1918 upon the aforesaid amount as a tax thereon the sum of $618.00, and the defendant has "unlawfully, knowingly, and wilfully failed and refused to account for or pay over the said sum against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided
7 (sections 800, 802, and 1308 of the Internal Revenue Law).

SECOND COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the 31st day of March, 1921, in the Southern District of New York and within the jurisdiction of this court, the above-named James J. Johnston unlawfully failed to make a return to the collector of internal revenue of the United States of money collected by him in payment of admissions to a boxing contest conducted by the defendant at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, city, county, and State of New York, on February 28th, 1921, in violation of the act of February 24, 1919, known as the revenue act of 1918, and that the defendant collected in payment of such admissions from the persons attending the said contest the sum of $6,180.00, and in addition thereto the defendant collected $618 as taxes on said admissions, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (sections 800, 802, and 1308 of the internal revenue law).

THIRD COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the first day of April, 1921, in the Southern District of New York and within the jurisdiction of this

court, the above-named defendant James J. Johnston unlawfully, knowingly, and wilfully embezzled the sum of $618.00, which was then and there money of the United States, in the following
8 manner, to wit, the said defendant conducted a boxing contest on February 28, 1921, at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the sum of $6,180.00 in payment of admissions thereto and in addition as taxes upon the said admissions under the provisions of the act of February 24, 1919, known as the revenue act of 1918, the defendant collected the sum of $618.00, representing a tax of one cent for every ten cents or fraction thereof paid by the various persons attending the said contest for admission thereto; that the said sum of $618.00 was money of the United States and was collected by the defendant under the provisions of said revenue act of 1918 for and on behalf of the United States, and it was the duty of the defendant to account for and pay over the said sum to the United States, and the defendant unlawfully, knowingly, and wilfully failed to pay the said sum to the United States and converted the same to his own use, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (section 47 of the Criminal Code).

FOURTH COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the 30th day of April, 1921, in the Southern District of New York, and within the jurisdiction of this court, James J. Johnston unlawfully, knowingly, and wilfully failed and refused to account for and pay over to the United States the sum of $2,937.30, being the amount of excise tax due and payable to the United States under the provisions of Title VIII of the act of February 24, 1919, known as the revenue act of 1918, upon
9 money received by the said James J. Johnston in payment of admissions, the said offense being more particularly described as follows:

That on the 10th, 24th, and 31st days of March, 1921, the said defendant conducted boxing contests in the building known as the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the admission fees paid by persons attending the said contests amounting to $29,373.00, and there was due to the United States under the provisions of the revenue act of 1918 upon the aforesaid amount as a tax thereon the sum of $2,937.30, and the defendant has unlawfully, knowingly, and wilfully failed and refused to account for or pay over the said sum against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (sections 800, 802, and 1308 of the internal revenue law).

FIFTH COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the 30th day of April, 1921, in the Southern District of New York and within the jurisdiction of this court, the above-named defendant James J. Johnston unlawfully failed to make a return to the collector of internal revenue of the United States of money collected by him in payment of admissions to boxing contests conducted by the defendant at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, city, county, and State of New York, on the 10th, 24th, and 31st day of March, 1921, in violation of the act of February 24, 1919, known as the revenue act of 1918, and that the defendant collected in payment of such admissions from the persons attending the said contests the sum of $29,373.00 and in addition thereto the defendant collected $2,937.30 as taxes on said admissions against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (sections 800, 802, and 1308 of the internal revenue law).

SIXTH COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the first day of May, 1921, in the Southern District of New York, and within the jurisdiction of this court, the above-named defendant James J. Johnston unlawfully, knowingly, and wilfully embezzled the sum of $2,937.30, which was then and there money of the United States, in the following manner, to wit, the said defendant conducted boxing contests on the 10th, 24th, and 31st days of March, 1921, at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the sum of $29,373.00 in payment of admissions thereto and in addition as taxes upon the said admissions under the provisions of the act of February 24, 1919, known as the revenue act of 1918, the defendant collected the sum of $2,937.30, representing a tax of one cent for every ten cents or fraction thereof paid by the various persons attending the said contests for admission thereto; that the said sum of $2,937.30 was money of the United States and was collected by the defendant under the provisions of said revenue act of 1918 for and on behalf of the United States and it was the duty of the defendant to account for and pay over the said sum to the United States, and the defendant unlawfully, knowingly, and wilfully failed to pay the said sum to the United States and converted the same to his own use against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (section 47 of the Criminal Code).

SEVENTH COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the 31st day of May, 1921, in the Southern District of New York and within the jurisdiction of this court, James J. Johnston unlawfully, knowingly, and willfully failed and refused to account for and pay over to the United States the sum of $1,998.10, being the amount of excise tax due and payable to the United States under the provision of Title VIII of the act of February 24, 1919, known as the revenue act of 1918, upon money received by the said James J. Johnston in payment of admissions, such offense being more particularly described as follows:

That on the 7th and 13th days of April, 1921, the said defendant conducted boxing contests in the building known as Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the admission fees paid by persons attending the said contests amounting to the sum of $19,981.00, and there was due to the United States under the provisions of the revenue act of 1918 upon the aforesaid amount as a tax thereon the sum of $1,998.10, and the defendant has unlawfully, knowingly, and willfully failed and refused to account for or pay over the said sum against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such
12 case made and provided (sections 800, 802, and 1308 of the internal revenue law).

EIGHTH COUNT

And the grand jurors aforesaid on their oath aforesaid to further present that heretofore, to wit, on the 31st day of May, 1921, in the Southern District of New York and within the jurisdiction of this court, the above-named defendant James J. Johnston unlawfully failed to make a return to the collector of internal revenue of the United States of money collected by him in payment of admissions to boxing contests conducted by the defendant at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, city, county, and State of New York, on the 7th and 13th days of April, 1921, in violation of the act of February 24, 1919, known as the revenue act of 1918, and that the defendant collected in payment of such admissions from the persons attending the said contest the sum of $19,981.00 and in addition thereto the defendant collected $1,998.10 as taxes on said admissions against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (sections 800, 802, and 1308 of the internal revenue law).

NINTH COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the first day of June, 1921,

in the Southern District of New York, and within the jurisdiction of this court, the above-named defendant James J. Johnston unlawfully, knowingly, and willfully embezzled the sum of $1,998.10, which was then and there money of the United States, in the
13 following manner, to wit, the said defendant conducted boxing contests on the 7th and 13th days of April, 1921, at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the sum of $19,981.00 in payment of admissions thereto and in addition as taxes upon the said admissions under the provisions of the act of February 24, 1919, known as the revenue act of 1918, the defendant collected the sum of $1,998.10, representing a tax of one cent for every ten cents or fraction thereof paid by the various persons attending the said contests for admission thereto; that the said sum of $1,998.10 was money of the United States and was collected by the defendant under the provisions of said revenue act of 1918 for and on behalf of the United States, and it was the duty of the defendant to account for the said sum to the United States and the defendant unlawfully, knowingly, and willfully failed to pay the said sum to the United States and converted the same to his own use against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (section 47 of the Criminal Code).

TENTH COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the 30th day of June, 1921, in the Southern District of New York and within the jurisdiction of this court, James J. Johnston unlawfully, knowingly, and wilfully failed and refused to account for and pay over to the United States the sum
of $850.50, being the amount of excise tax due and payable
14 to the United States under the provisions of Title VIII of the act of February 24, 1919, known as the revenue act of 1918, upon money received by the said James J. Johnston in payment of admissions, the said offense being more particularly described as follows:

That on the 3rd and 19th days of May, 1921, the said defendant conducted a boxing contest in the building known as the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the admission fees paid by persons attending the said contest amounting to the sum of $8,505.00, and there was due to the United States under the provisions of the revenue act of 1918 upon the aforesaid amount as a tax thereon the sum of $850.50, and the defendant has unlawfully, knowingly, and wilfully failed and refused to account for or pay over the said sum against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (sections 800, 802, and 1308 of the internal revenue law).

ELEVENTH COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the 30th day of June, 1921, in the Southern District of New York and within the jurisdiction of this court, the above-named James J. Johnston unlawfully failed to make a return to the collector of internal revenue of the United States of money collected by him in payment of admissions to a boxing contest conducted by the defendant at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, city, county,
15 and State of New York, on February 28, 1921, in violation of the act of February 24, 1919, known as the revenue act of 1918, and that the defendant collected in payment of such admissions from the persons attending the said contest the sum of $8,505.00, and in addition thereto the defendant collected $850 as taxes on said admissions against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (sections 800, 802, and 1308 of the internal revenue law).

TWELFTH COUNT

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore, to wit, on the first day of July, 1921, in the Southern District of New York and within the jurisdiction of this court, the above-named defendant, James J. Johnston, unlawfully, knowingly, and wilfully embezzled the sum of $850.50, which was then and there money of the United States, in the following manner, to wit: The said defendant conducted a boxing contest on February 28, 1921, at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the sum of $8,505.00 in payment of admissions thereto and in addition as taxes upon the said admissions under the provisions of the act of February 24, 1919, known as the revenue act of 1918, the defendant collected the sum of $850.50, representing a tax of one cent for every ten cents or fraction thereof paid by the various persons attending the said contest for admission thereto; that the said sum of $850.50 was money of the United States and was collected by the defend-
ant under the provisions of said revenue act for 1918 for and
16 on behalf of the United States, and it was the duty of the defendant to account for and pay over the said sum to the United States, and the defendant unlawfully, knowingly, and wilfully failed to pay the said sum to the United States and converted the same to his own use, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (section 47 of the Criminal Code).

WILLIAM HAYWARD,
United States Attorney.

17 In United States District Court

[Title omitted.]

Docket entries

1921

Sept. 9. Filed indictment.
19. Defendant pleads not guilty.
19. Filed recognizance, $100. Ed. J. Byrne, surety.

Nov. 7. Filed recognizance, National Surety Co.
3. Trial begun before Van Fleet, J.
4. Trial continued.
7. Trial concluded. Verdict guilty on counts 1–12, with a
18 very strong recommendation of mercy of the court. Sentence adjourned to November 10, 1921. Bail fixed at $5,000.00 for appearance on 11/10/21.

Nov. 10. Sentence adjourned to November 14.
14. " " " " 28.
28. " " " " 29.
29. " " " " 30.
30. " " " December 3.

Dec. 3. " " " " 5.
5. Defendant sentenced to 60 days in Essex Co. Jail, Newark, N. J., and to pay a fine of $500.00 and to stand committed until fine be paid and released on $2,000 pending appeal. Issued commitment and duplicate.

6. Filed recognizance on writ of error, $2,000. National Surety filed petition for writ of error, writ of error, citation, assignment of error, order allowing writ and order extending time to file amended assignment of errors to 30 days from date.

1922

Mar. 6. Filed order, Webb, J., Nov. Term, 1921, extended to June 5, 1922.
31. Filed order, A. N. Hand, J., Nov. Term, 1921, extended to Aug. 5, 1922.

Aug. 3. Filed order, A. N. Hand, J., Nov. Term, 1921, extended to Sept. 5, 1922.
3. Filed bill of exceptions and letter from W. J. Van Fleet, J.
Oct. 16.

19 In United States District Court

Verdict

Verdict guilty on counts one to twelve, with a very strong recommendation of mercy of the court. Sentence adjourned to November 10, 1921. Bail fixed at $5,000 for appearance on November 10, 1921.

In United States District Court

Judgment

Sentence adjourned to December 5, 1921.

Sentenced to sixty days in Essex County jail, Newark, New Jersey, and to pay a fine of $500, and to stand committed etc.

VAN FLEET, *J.*

Released in $2,000 bail pending appeal.

20 In United States District Court

[Title omitted.]

Bill of exceptions

Be it remembered that the above-entitled cause came on for trial on the 3rd day of November, 1921, being one of the days of the November term of said court, before the Honorable W. C. Van Fleet, one of the judges of said court, and a jury duly impaneled.

P. T. McCoy, assistant to the United States district attorney, appeared as counsel for the Government.

George E. Coughlin, Esq., appeared as counsel for the defendant.

The jury was impaneled and examined, and after they were selected were duly sworn.

21 (Mr. McCoy opened the case to the jury on behalf of the Government.)

The Government, to maintain its cause, offered the following evidence, to wit:

FRANK C. HAYDEN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McCOY:

Q. Mr. Hayden, what is your occupation?

A. I am an attorney.

Q. Admitted to the bar of the State of New York?

A. Yes.

Q. Do you know the defendant, James J. Johnston?

A. I do.

Q. When did you first meet the defendant James J. Johnston; about when?

A. I think I met him first about two or three years ago.

Q. Do you know anything about the affairs of the Central Manhattan Boxing Club?

A. Yes.

Q. Were you the attorney for the Central Manhattan Boxing Club in 1921, the months of February, March, and April?

A. No; I was the attorney for the Central Manhattan Boxing Club during the months of January and February, that is the time I

acted for the club. At other times I was acting for the Manhattan Casino.

Q. Then you represented the owners of the Manhattan Casino?

A. Owners and lessees; that is to say, the owner leased to a corporation. The two owners leased to a corporation.

Q. Who were the lessees?

A. The Manhattan Casino, Inc.

Q. Did the Manhattan Casino, Inc., sublet the premises to the Manhattan Boxing Club?

A. Yes.

22 Q. The Central Manhattan Boxing Club?

A. Yes.

Q. Did you act as attorney in drawing any papers in connection with that subletting?

A. I drew the lease to the Central Manhattan Boxing Club, Inc., for the Manhattan Casino.

Q. What was the Central Manhattan Boxing Club, Inc., formed for; for what purpose?

A. It was formed solely for the purpose of conforming to the law of the State athletic commission, which required that any license given must, for a boxing exhibition, be given to a domestic corporation, not—well, a domestic corporation.

Q. And did the Central Manhattan Boxing Club obtain a license from the State athletic commission to conduct boxing contests?

A. A license was given to the Central Manhattan Boxing Club about November 26th or November 28th, 1920; about that date.

Q. Did the Central Manhattan Boxing Club operate under that license?

A. Yes.

Q. They conducted boxing contests?

A. Yes.

Q. It is customary, as I understand it, according to the law of New York State, that each boxing club, as part of the personnel of each boxing club, there is a matchmaker; isn't that so?

A. That is provided in the application for the license. The matchmaker to give his pedigree so that the boxing commission may approve or disapprove——

Q. Of his character?

A. Of his character.

Q. Who was the matchmaker for the Central Manhattan Boxing Club at the time that they obtained this license from the State of New York?

A. James J. Johnston.

Q. Was James J. Johnston solely the matchmaker; was he employed in that capacity by the Central Manhattan Boxing Club?

23 Mr. COUGHLIN. I object to any further testimony concerning the relations of James J. Johnston and the Central Manhattan Boxing Club by this witness on the ground that this witness

would be violating a confidence, that these matters came in to his knowledge by reason of the professional relation of attorney and client, that during a period that he learned these intimate relations concerning Mr. Johnston he was acting as attorney for Mr. Johnston and receiving fees in payment of his service.

The COURT. The Government is not bound by that. That rule obtains in civil controversies. Of course, the Government, in a criminal prosecution, is not bound by that rule at all. The objection is overruled.

Mr. COUGHLIN. Exception.

Q. (The stenographer repeated the last question.)

A. He was.

Q. Was he paid a salary?

A. No, sir.

Q. What compensation did he receive from the Central Manhattan Boxing Club for acting as matchmaker?

A. No compensation from the club whatsoever.

The COURT. What was his relation?

The WITNESS. A contract was signed by Mr. Johnston wherein and whereby he agreed to pay a specific rental for the use of the Manhattan Casino at least one night a month, and he agreed to conduct the affairs of the boxing exhibitions and pay a specific rental, and all that the club or casino agreed to do was to furnish the hall
of the Manhattan Casino, lighted and heated for a boxing
24 contest, with a ring and as many chairs as they had left of
the previous régime of boxing in New York State, and that closed the books so far as the club or casino was concerned; and Johnston, on his part, agreed to furnish us ticket takers, ticket sellers, exhibitions, and to pay for the exhibitors, the boxers, and be solely responsible for any contract entered into with anyone that did anything in and about the carrying on of the contest each night; $750 to be paid for the first night each month and $500 for each succeeding night during the month.

Q. Is that all in the contract that you referred to?

A. Yes, sir.

Q. The Government issued a subpœna duces tecum to produce that certain contract?

A. Yes.

Q. Have you that contract with you?

A. Yes.

Q. May I see it, please?

A. (Witness produces paper.)

Mr. MCCOY. I offer this contract in evidence, your honor.

Mr. COUGHLIN. Objected to on the ground that the contract is one which is a matter of civil relation between this defendant and another person, and that it can not fix any criminal liability, the only issue involved in this prosecution.

Mr. MCCOY. Your honor, the contract is going to show the relationship between the defendant and the Central Manhattan Boxing

Club, to show who is responsible for the taxes that should have been paid to the Government.

The COURT. The objection is overruled.

Mr. COUGHLIN. Exception.

25 (The contract above referred to was received in evidence and marked "Government's Exhibit 1" of this date.)

(Mr. McCoy then read Exhibit 1 to the jury.)

(A recess was taken to November 4, 1921, at 10.30 a. m.)

NEW YORK, *November 4, 1921, 10.30 a. m.*

FRANK C. HAYDEN resumed the stand.

DIRECT EXAMINATION CONTINUED BY MR. MCCOY:

Q. Mr. Hayden, I am reading now from the Government's Exhibit No. 1, namely, the contract between the Central Manhattan Boxing Club and James J. Johnston, executed and entered into on the 26th day of November. One of the provisions in the agreement is as follows: "This contract shall remain in force during the life of the present license held by the Central Manhattan Boxing Club, Inc., but may be terminated by either party by the giving of ninety days' written notice." Was such notice ever given to the Central Manhattan Boxing Club of termination?

A. To the Central Manhattan Boxing Club?

Q. Yes.

A. No.

Q. In other words, this contract is still in force, as far as any notice being given terminating it is concerned?

A. No; I terminated the contract; I gave a ninety-day notice some time on June the first, and the contract was terminated on or about September the first.

26 Q. You, on behalf of the Central Manhattan Boxing Club?

A. Yes; terminated the contract.

Q. What was your reason for terminating that contract?

A. Well, on May 19th Johnston was in arrears to the club in the sum of $952.

Q. For rent?

A. For rent.

Q. That was rent for the various contests that he had held there?

A. That was $250 balance of May 3rd, $250 forfeit of May 10th, and $500 rental for the contests held on the evening of May 19th, making a total of $1,000; and then Mr. Waldron, of the Manhattan Casino, had purchased $48 worth of tickets; that left a balance due from Johnston to the club or the casino—all of the checks were made direct to Mr. Waldron, not to the club at all—in the sum of $952.

Q. Whose checks were they; were they the personal checks of James J. Johnston, the defendant?

A. Well, I was given a check of Mr. Johnston's, and I gave a receipt for the sum of $952, in full payment of the account, to him,

and shortly after that Mr. O'Brien said that Mr. Johnston would call at the Casino and give me the money in cash.

Q. Who is Mr. O'Brien?

A. Joe O'Brien was Johnston's assistant.

Q. Is that the gentleman for whom I have requested a warrant be issued?

A. I don't know anything about that.

Q. Joseph N. O'Brien?

A. I only know his name is O'Brien—Joe O'Brien possibly; I am not sure of his first name; his name is O'Brien, I think, and I think his first name is Joe, but I am not positive about that.

Q. Who was he?

A. He was the man that took charge of all of Johnston's financial matters; he would give me the cash or he would give me a
27 check; I would give him a receipt, or he would give me a receipt, however it happened to be; he handled all his affairs.

Q. He was Johnston's agent?

A. He was Johnston's agent. I handled everything for the Manhattan Casino and the Central Manhattan Boxing Club, and all moneys that were paid to the club were paid to me by O'Brien. I don't recall that Johnston ever paid me a nickel; O'Brien gave me the checks or cash and I gave O'Brien back a receipt for any moneys that were due for rent, and the only money that we ever received was moneys for rent.

Q. Did you ever ask Johnston for this rent money?

A. Yes; I wrote him several times; I talked with him over the telephone, sent men over to his office, and finally gave it up.

Q. Did he ever tell you that his agent, O'Brien, would pay you?

A. No; he told me he would pay me; I think it was about July the 12th he was at my office and he agreed at that time to execute a confession of judgment in the sum of $3,202. That was rent to September the 1st, or he would pay me in cash $1,700—that is, by a series of three or four notes—I still have the notes unsigned and I still have the confession of judgment unsigned; I still have the agreement unsigned in my pocket here, I believe—that was to be in settlement of our account. About that time we had been before the boxing commission on the payment of the State tax, Johnston said he had paid that, that he had sent a man to Albany to appear before the boxing commission, and it was a few days after that that the president of the club was served with a subpœna and brought it to my office to appear at the United States district attorney's office.

So then I called up Johnston and his attorney answered on the
28 'phone and said that he understood the tax had been paid to the Government. So then he put O'Brien on the 'phone.

Q. Is this the same Joe O'Brien?

A. That is O'Brien. O'Brien said the Federal tax had been paid. "Well," I said, "before I will do anything further on settling the account of the club with Johnston I want to see the receipt from

the Government showing that that tax has been paid by Johnston as the agreement calls for." He said he would do that. Since then I never saw Johnston in my office.

Q. Did Johnston hold O'Brien out to you as his agent?

A. I don't know whether you would say held him out: O'Brien handled all of his matters, all of the financial arrangements: all the cash was held by O'Brien: O'Brien paid off all of the ushers, the ticket takers, and ticket sellers, referees, and timekeepers: they were all paid by O'Brien.

Q. Isn't it a fact that O'Brien held himself out as Johnston's secretary?

Mr. COUGHLIN. I object to that, your honor, as not binding on this defendant.

The COURT. Yes: I think so.

Mr. McCOY. I withdraw the question.

Q. Under this agreement did the defendant conduct boxing contests at the Manhattan Casino during the months of February, March, April, and May of 1921?

A. Yes.

Q. And did he pay to the Central Manhattan Boxing Club, according to this agreement, rentals due for those contests?

A. He did: he paid the rent right along up to May 3rd, and that night there was a balance due of $250, and up to that time he had paid the rent right along, paid his obligations to the club in full.

The payments were a little bit delayed at times, but Johnston
29 always made the payments in the course of a few days—the payments were a little late sometimes, but he would make the payments later.

Q. And during the time he conducted these bouts, did the Central Manhattan Boxing Club at any time employ any of the ticket takers, ticket sellers, ushers, or any of the other employees connected with the conduct of these contests?

The COURT. Did he employ them or the boxing club?

Mr. McCOY. The Central Manhattan Boxing Club.

The WITNESS. No.

The COURT. They had nothing to do with that?

The WITNESS. No; if I might state, the Central Manhattan Boxing Club was incorporated at Johnston's expense for the purpose of getting a license. Johnston paid the cost of incorporating: Johnston also paid the license fee of $750; Johnston paid $50, the cost of the bond: and the only reason why the corporation was formed was simply that Johnston could get a license for the operation of a boxing club, and the license was issued to him personally, and he still has it.

Q. He still has that license?

A. Yes.

The COURT. And under the State law the license has to be in the hands of a corporation?

The WITNESS. Of a corporation. That being true, a corporation was formed at Johnston's expense. He paid me the cost of incorporating and paid the license fee of $750, and he paid the premium on the bond.

30 Q. Mr. Hayden, did anybody at any time, other than the defendant James J. Johnston, conduct boxing contests at the Manhattan Casino or the Central Manhattan Boxing Club during the months of February, March, April, and May, 1921?

A. Yes.

Q. Will you state the circumstances and the time?

A. On April 19th the Manhattan Casino, for no charge, gave the use of the hall to a colored organization for a charitable purpose, and this colored organization, conducted by a Mrs. Dr. Reed, desired to hold boxing bouts, and she went down to the boxing commission and was told that the only way boxing exhibitions could be held was under a license, and she was referred to Mr. Johnston. Mr. Johnston told me that he received $500 for the use of the license on that night. I asked him to give some part of that $500 to the casino in view of the fact that the hall had been used; that there was certain wear and tear and that they should get some part of it. He said, "No; Mr. Waldron gave the use of the hall for nothing; that is his business; I am giving this organization the use of the license for $500, and that is my business; the license belongs to me," and he kept the $500.

Mr. McCOY. Your witness.

Cross-examination by Mr. COUGHLIN:

Q. Mr. Hayden, you are an attorney admitted to the practice of law?

A. Yes.

Q. Did you ever represent the Manhattan Casino, Inc.?

A. Yes.

Mr. McCOY. Your Honor, this has all been testified to.

The COURT. He has already said so.

31 Mr. COUGHLIN. There were various corporations there bearing similar names and I want to have it all brought out.

The COURT. It is proper cross-examination.

Q. Did you ever represent the Manhattan Athletic Club?

A. Yes.

Q. Did you ever represent the Central Manhattan Boxing Club?

A. Yes, sir.

Q. Did you ever represent James J. Johnston as his attorney?

A. Yes, sir.

Q. When this contract between the Central Manhattan Boxing Club and Johnston was entered into, did you represent Johnston as his attorney at that time?

A. No, sir.

Q. Who did you represent then?

A. I represented the Manhattan Casino, the owners of the Manhattan Casino.

Q. Well, they were not a party to the contract; the contract was between the Manhattan Casino, Inc., and James J. Johnston; who did you represent?

A. I represented the Manhattan Casino.

Q. Were they a party to that contract?

A. They were.

The COURT. Owners of the property?

The WITNESS. Yes, sir.

Mr. COUGHLIN. Your honor, can I show the witness the contract which is in evidence?

The COURT. Certainly.

Q. Will you show me, anywhere in that contract, where the Manhattan Casino is mentioned as a party or appears as a party?

A. The Manhattan Casino does not appear here in black and white, but it was necessary to have a lease drawn from the casino.

32 Mr. COUGHLIN. I object to the voluntary statement of the witness, not responsive to my question.

The COURT. As I understand the transaction, he testified to it yesterday, that the Manhattan Casino was the owner of this property and it contracted with this corporation to let it have the property of this corporation that is recited in this contract, and they made a contract with Johnston; is that the situation?

The WITNESS. That is right.

The COURT. That is what he testified to yesterday.

Q. Didn't the Manhattan Casino, Inc., make a lease with the Central Manhattan Boxing Club?

A. It did.

Q. Wasn't there another corporation intermediary there?

A. There was a previous boxing club known as the Manhattan Athletic Club of America and a previous contract had been drawn up between Johnston and the Central Manhattan Athletic Club in 1917, I believe, and we endeavored, in 1920, to have a similar contract drawn, but Johnston's associates made many changes, and when it came down to about the end of November, because of the fact that the Manhattan Athletic Club of America was a membership corporation, the State Athletic Commission were not desirous of giving a license; they said, "You will have to give a complete statement of the assets and the membership," and a great big rigamarole, which would have made it practically impossible to go ahead because the Manhattan Athletic Club was a membership corporation, which practically ceased to exist with the old boxing law. So, at the suggestion of the boxing commission, and at their instance, this

33 Central Manhattan Boxing Club, Inc., was formed, and that club is the party which does the work for the Manhattan Casino. In other words, we had to have that club contract with Johnston; the Central Manhattan Casino could not contract with them because they did not hold a license, so I formed that club. Here is the situation, Mr. Johnston says, "I want to run boxing bouts——"

Q. Did you draw that contract?

A. I did.

Q. Did Mr. Johnston have any attorney present when it was executed?

A. I don't know if any of the men were attorneys or not; there were about five of them that looked it over, and they made various changes in it, as appears on the contract itself.

Q. Was Johnston, the defendant here, an officer or stockholder of the Central Manhattan Boxing Club?

A. No, sir.

Q. You have mentioned a man by the name of Joseph O'Brien; do you know whether he was an officer of the corporation or not?

A. He was appointed by Johnston as the assistant treasurer. In other words, Johnston told me that the report was sent to the State and Federal authorities by O'Brien; that O'Brien was signing his name as assistant treasurer without the consent of anybody connected with the corporation.

Q. Did you ever authorize the appointment of O'Brien as assistant treasurer?

A. No. I told Johnston it would be all right; he could send the reports direct through O'Brien if he wanted to do so, so long as the reports went in to the State and to the Government, because we had considerable delay having the reports signed by Mr. Smith, of 50 Broad Street—I handled that myself, and it took about two days to do it, to get the same Mr. Smith to sign the reports of the income and the returns on the first night's fight—I did not do
34 it on the second night's fight, and Johnston told me that the report had been sent in by Mr. O'Brien, and that he signed his name as assistant treasurer. No meeting of the corporation was ever held electing O'Brien assistant treasurer, but I made no objection to it because it assisted Johnston in the conduct of his bouts under his license.

Q. Now, you took a long time to answer that question whether you authorized the appointment of O'Brien as assistant treasurer; now answer it yes or no.

A. I authorized it, yes; but there was no meeting of the corporation.

Q. Was anyone except yourself actively engaged in supervising the business of the Central Manhattan Boxing Club?

A. No, sir; I had entire charge of it.

Q. Were any payments of State taxes made by this assistant treasurer to you?

A. No, sir.

Q. Did you ever make any payment to the State boxing commission?

A. No, sir.

Q. Or to the comptroller's office?

A. No, sir.

Q. Do you know now, Mr. Hayden, whether there are any unpaid admission taxes charged by the collector of internal revenue against the Central Manhattan Boxing Club?

A. I personally don't know a thing about it, except that O'Brien stated that the tax had been paid and the district attorney's office informed me to the contrary.

Q. Had you ever received any notice of any other admission taxes due by that corporation which you represent had not been paid?

A. I never received a notice.

Q. Did you ever cause any notice to be given to the collector of internal revenue that a lease was made to Mr. Johnston, and that the collector was to look to him for payment of admission taxes?

A. No, sir.

35 Q. Did you ever cause any notice of that character to be sent to the State boxing commission?

A. No, sir.

The COURT. Are you an officer in either of these companies?

The WITNESS. No, sir. All of the mail addressed by the internal revenue officer or by the State collector of this tax was sent to the Central Manhattan Boxing Club, and all of the mail of the Central Manhattan Boxing Club was delivered personally to Johnston by the Manhattan Casino or was held there until his arrival, or notified at his home that he was to come and get it. So that every letter which was sent to the Central Manhattan Boxing Club was given personally to Mr. Johnston; nobody dared or would open up that mail, and it lay there, at times for a month, and when I was there in August there was still mail there for the Central Manhattan Boxing Club, which we would not open because it was Johnston's mail; so I wouldn't get any notice from the Government.

Q. Then, Mr. Hayden, when you stated a few minutes ago that nobody else was actively engaged in managing the affairs of the Central Manhattan Boxing Club you were forgetting Mr. Johnston; you mean he was actively engaged in managing it; is that right?

A. Well, the Central Manhattan, as a corporation, in any of the affairs of the corporation or the receipt of moneys, I had entire charge of that; but so far as the conduct of these bouts was concerned, and all communication which were directed to the club, were given

36 to Johnston. So far as the club was concerned, I handled all that matter; so far as correspondence is concerned, that went direct to Johnson, because it was his matter to take care of. You can appreciate the distinction; all we wanted was the rent, and that was paid by check, either to Mr. Waldron or to myself personally; that was the only money we ever received from Johnston.

Q. In this contract that was drawn by you between the Central Manhattan and Johnston, it doesn't mention anything about rent.

A. What does it say?

Mr. COUGHLIN. I ask to have that answer stricken out.

The WITNESS. Well, it is in evidence.

Q. When you drew this contract, Mr. Hayden, why didn't you call it a lease?

A. I had no reason for not calling it a lease; I simply drew up a contract, according to the terms of our agreement—you might call it a lease, and it might not be a lease; you might call it a contract, and it would still be a lease.

Q. You stated on your direct examination that a license was issued to Johnston; do you want to amend that?

A. The license was given to Johnston, I said, by the boxing commission. He went down there and paid the $750, and they gave him a license. I never saw it, and I can say that nobody else that was a stockholder or officer or director in the Central Manhattan Boxing Club ever say that license, because it was given to Johnston; and when he was up in my office in July settling up the accounts, I said, "I want that license before I settle up, because now we will have charge of it," but he said, "I will do nothing of the kind."

Q. Did you ever see the license?

A. No, sir.

37 Q. Do you know whether it was issued in his name or not?

A. I know it was issued in the name of the Central Manhattan Boxing Club; I surmise that because that is the party who held the license.

Q. Do you know whether that license would state that Mr. Johnston was given permission to conduct bouts in this State?

A. No; but the application for the license provided that he was a matchmaker, and it is understood in boxing——

Mr. COUGHLIN. I object and ask to have it stricken out as not responsive, merely a voluntary statement on the part of the witness.

The COURT. Well, he didn't finish it and it has no meaning. I think this would have to be construed as nothing more or less than a lease of the premises to the boxing club under its terms.

The WITNESS. Johnston is the outsider.

The COURT. I understand that, but counsel is asking why you designated this as a lease in drafting it.

Q. Mr. Hayden, you stated that all moneys that were paid to you under this contract were paid by a man named O'Brien.

A. Yes, sir; and I gave him a receipt—I have such a receipt with me, if you would like to see it, to show you the method. O'Brien had a book of receipts, and every man that worked there that night O'Brien would pay him money and he would sign a receipt and O'Brien kept that book of receipts, so when he gave me money I would give him back the receipt. The last time he gave me money he gave me the receipts and I still have the receipts to show you how the business was conducted, one of the last book of receipts.

38 Q. Were these sums paid on the night that the boxing exhibitions were conducted?

A. On the first two or three contests O'Brien paid the rent in cash. On the first night, when they had closed up for the night and were going home, I called their attention to the fact that they had not paid the rent, so we went back into the ticket office, the valise was opened up in Johnston's presence and $750 taken out of the valise

in Johnston's presence and given to me. I then gave him a receipt for the $750—so on the night in particular I do recall that they paid me on the night of the contest—they went back into the office at my instance and opened up the valise and gave me the $750.

Q. Was that the only occasion?

A. No, sir; on two or three subsequent occasions I was paid in cash by O'Brien the rental for that night, or if there were any arrears I was paid up. But subsequently, on at least four or five occasions, I was paid by check given that night; either a check of one of Johnston's brothers or a personal check on a bank at 40th Street and Broadway—those checks I was told not to put in for a day or so until the money got into the bank. When I went down to have them certified I couldn't get it done.

Q. When application was made to the State boxing commission for a license to conduct bouts in the name of the Central Manhattan Boxing Club was anything said at that time to the effect that Johnston was the principal or that he would be responsible for the payment of taxes?

A. Before the boxing commission?

Q. Yes.

A. I don't think so. We submitted a written form of application and a license committee acted upon it; I didn't speak with any member of the license committee.

Mr. COUGHLIN. That is all redirect by Mr. McCoy.

39 Q. Mr. Hayden, did the Manhattan Boxing Club, Inc., ever make any reports, any boxing reports, to the State athletic commission for the payment of taxes?

A. To the State athletic commission?

Q. Yes.

A. You see, I handled the first report made to the State athletic commission within two days after the first bout; I superintended that myself, and E. O. Smith as secretary signed that statement, and it was brought to the commission by myself personally—I had to go there.

Q. On what date was that?

A. That would be about December 1st or 2nd.

Q. Well, we are not concerned with that. On February the bout that was held for the month of February, were the reports of the show filed for the month of February—did the Central Manhattan Boxing Club make any report, tax reports, to the State athletic commission for that month?

A. To the State athletic commission for the State tax, you mean?

Q. Yes.

A. I don't know anything about that. All I know is this—I don't know a thing about it; that was being handled by Johnston. Whether he made the reports or not I don't know.

Q. But the Central Manhattan Boxing Club did not make the reports?

A. No officer of the Central Manhattan Boxing Club or myself made any reports. Now, I exclude from my answer the assistant treasurer appointed by Johnston, who was supposed to make the report; I don't know what he did, but I do know that no duly authorized officer of the club ever made any report during the months of February, March, April, and May to the State athletic commission or anybody else; that was entirely handled by Johnston.

Q. You mentioned on cross-examination a receipt for
40 moneys received and paid to you by O'Brien. Have you that receipt with you?

A. Yes; I have.

Q. May I see it?

A. No; I don't find it.

Q. Would it be in your pockets, Mr. Hayden?

A. I took it out yesterday; I don't know whether I put it back or not.

Q. Well, Mr. Hayden, are you sufficiently familiar with the contents or the wording of that receipt——

A. Here it is [handing paper to counsel].

Q. Who did you receive this receipt from?

A. From O'Brien.

Q. O'Brien gave you this receipt?

A. Yes, sir.

Mr. McCoy. Your honor, I offer this receipt in evidence as showing the relation between the defendant James J. Johnston and O'Brien.

Mr. Coughlin. I object to it, your honor, as not binding on this defendant; not signed by him; he doesn't know anything about its existence; it might have been written out by Mr. O'Brien.

The Witness. It was written out by Mr. O'Brien, the body of it.

The Court. Was the name of James J. Johnston stereotyped on there at that time?

The Witness. Yes, your honor. The body of the receipt was prepared by O'Brien in my presence; I signed it when I received the check, and when I gave back the check I got back the receipt.

The Court. I will let it go in. It purports to be a receipt to Mr. Johnston.

Mr. Coughlin. Receipt addressed to Johnston?

The Court. Yes.

41 Mr. McCoy. A receipt from James J. Johnston, and the receipt was drawn by Mr. O'Brien.

Mr. Coughlin. The defendant excepts.

(Marked "Government's Exhibit No. 2.")

Mr. McCoy. This receipt is dated May 19, 1921, received from James J. Johnston $552, in full payment to date for Manhattan Casino, if check goes through. Signed F. C. Hayden, for the Central Manhattan Boxing Club.

The Court. I don't think it says James J. Johnston.

Mr. McCoy. Yes, sir; James Johnston.

Q. This receipt was made out by Mr. O'Brien?

A. Yes, sir.

Q. He did not fill in the name of James J. Johnston?

A. That was stamped on all the receipts previously.

Q. And O'Brien filled in the handwriting?

A. That is right. There was $250 balance of May 3rd, $250 of May 10th, and $500 May 19th, less $48 in tickets given to Mr. Waldron, leaving a balance due of $952 for rent.

Mr. McCoy. That is all.

Recross-examination by Mr. Coughlin:

Q. Mr. Hayden, when I asked you on cross-examination whether you had made any report to the State boxing commission for any exhibitions held during the period of this contract, did you say no?

A. I don't recall my answer; but I should have said no; I didn't make any report to the State boxing commission. I made complaint to the State boxing commission; do you mean a report
42 in the form of a complaint? I complained about Johnston; I did that.

Q. Did you ever make a return?

A. No return at all.

Q. Did you state on redirect that you had made returns on the first show that was held?

A. Well, on the first show that was held, I said that the secretary, E. O. Smith, the man I had appointed secretary of this club, signed a return, and I personally brought that report to the State boxing commission. Now, it may have been, and I think Johnston gave me the cash to pay the State boxing commission the tax—now that you recall it, he gave me in cash 5 per cent, which I paid over by my check, or I gave my check for the 5 per cent State tax for the first show, and it was after the first show that Johnston ran off himself, when this man O'Brien acted as assistant treasurer at his election——

Mr. Coughlin. I ask to have that stricken out.

The Court. There is nothing improper in that; it is in answer to the question.

Q. As to the appointment of O'Brien, about which you were questioned, you just stated that you authorized or had a certain man appointed as secretary to the club; is that true?

A. Yes, sir.

Q. Was that the way that the officers of this club were selected, by your personal say-so?

A. This club was incorporated by myself. I had to have a corporation holding the lease from the Manhattan Casino that I could control. I couldn't give a corporation that could control the operation of that casino for a year to an outside organization, so the men who held stock in the Manhattan Boxing Club were men I
43 selected that should hold stock, and the officers were friends of mine that I personally selected because they were well known and well informed and men of good standing in the commu-

nity, so as to give the club a good appearance, and they were personal friends of mine, and those men made up the officers and directors of that club; Elbert O. Smith was secretary. It was a duly organized corporation, and we held meetings to carry out that idea, so it was done strictly in accordance with the law, and that is why it was done. But you asked me about the appointment of an assistant treasurer; that was Johnston's method of doing it; but, I say, I made no objection to his appointment of O'Brien as assistant treasurer so long as it assisted him in making the reports on time, getting them in on time; that was the idea.

Q. Was your position purely passive on this appointment as assistant treasurer, or did you take any positive stand on it yourself?

A. I took no positive stand I simply said all right.

Q. Did you ever notify anyone that he was assistant treasurer?

A. No, sir.

Q. Did you ever notify anyone that there was any such officer as that?

A. No, sir.

Q. Is that your signature to this paper, Mr. Hayden [handing witness paper]?

A. (No answer.)

Q. I ask you if that is your signature. I don't think it is necessary to read it.

A. Yes, sir; that is my signature.

Mr. COUGHLIN. I offer that in evidence.

Mr. McCOY. I have no objection.

(Marked "Defendant's Exhibit A.")

Mr. COUGHLIN (reading to the jury): "Gentlemen in the Central Manhattan Boxing Club: Your communication dated July
44 12th asking for the payment of November, 1920, tax of $150.78 has been referred to me. Will you kindly notify me at once as to any and all amounts that are due for unpaid taxes on sales from November 28, 1920, to May 20, 1921. The taxes were collected and paid to the assistant treasurer and the matchmaker of the club, and the moneys, if not paid, are still held by them. Kindly advise me as to what amount is due and the dates for which the sales tax has not been paid. Yours very truly, (Signed) F. C. Hayden."

Q. Now, Mr. Hayden, do you want to amend your testimony that you never notified anybody that there was an assistant treasurer?

A. Well, I say I acquiesced in Johnston's statement.

Q. You notified the Government officials that there was an assistant treasurer of this club, didn't you?

A. I did.

Q. Was there any other person who was appointed assistant treasurer except O'Brien?

A. No, sir.

Mr. COUGHLIN. That is all.

By Mr. McCoy:

Q. Mr. Hayden, you testified that O'Brien was appointed assistant treasurer in a very informal way by Johnston to act as assistant treasurer in name for him, in order to facilitate the payment of these taxes.

A. Yes, sir.

Q. He was not appointed by any authorized meeting of the Central Manhattan Boxing Club, Inc.?

A. No; just simply let it stand.

Q. That is, you acquiesced merely in Johnston's appointment?

45 The Court. Let him answer. He has already so stated, but I would not put the words in his mouth. His testimony was, in effect, that he simply acquiesced in the naming of O'Brien, because the whole transaction was Johnston's, and that he let Johnston's representative act as assistant secretary.

Q. You say "the taxes were collected and were paid to the assistant treasurer and the matchmaker of the club and the moneys, if not paid, are still held by them." Just what do you mean by that, Mr. Hayden?

The Court. Well, what is there that one would not understand from that?

Mr. McCoy. I want to bring out clearly, your honor, how these moneys were collected and paid. It was apparently within his knowledge, when he writes such a letter of that kind, as to how they were collected or how they may be collected by the Central Manhattan Boxing Club and turned over to the matchmaker or the assistant treasurer, whether the assistant treasurer and the matchmaker collected the money.

The Court. Well, you can ask him if the Central Manhattan Boxing Club ever in fact received the money, or how it came in to Johnston or to O'Brien; who received it?

The Witness. Johnston; Johnston and his assistant sold the tickets and collected the tax.

The Court. Under this contract, as I understand it, Johnston has full control?

The Witness. Absolutely; we had nothing to do with it at
46 all. Those moneys were collected and should have been turned over; that is all I know about it.

Mr. Coughlin. That is all.

Henry G. D. Carr, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. McCoy:

Q. Mr. Carr, what is your occupation?

A. Cashier, State athletic commission.

Q. Do you receive reports of taxes for admission to boxing exhibitions?

A. I do.

Q. I show you here some papers containing a report—this is the report of the Central Manhattan Boxing Club.

The COURT. Just show it to him.

Q. Was that report filed with you, Mr. Carr?

A. No; that is not a report that is filed with me.

Q. How is that?

A. That is a different report; that is a report of the boxers and judges; it is the financial report that is filed with me—the financial report is on another paper.

Q. Could you pick out that financial report among these?

A. This is the report that is filed with me; that is the financial report [handing counsel paper].

Q. Does this financial report show the tax on admission tickets sold, due the State?

A. Yes.

Q. Will you show me that, please?

A. $309—5 per cent.

Q. Do you know with whom this report is filed?

47 A. That is filed with the commissioners; that is for the purpose of checking up the boxers and judges.

Q. But that report was filed with your commission; is that so?

A. Yes, sir.

Q. And these reports come to you in due course, do they not?

A. They do.

Q. They become a part of the papers that are filed after each contest by the promoters?

A. Yes.

The COURT. Why do you say this was not filed?

The WITNESS. All those papers are filed with the commission, but the financial report is the only one I check.

The COURT. You are the secretary?

The WITNESS. I am the cashier. The only one I check is the financial report.

Q. Have you ever seen the signature of the defendant, James J. Johnston, on any reports filed that came to your attention in your official capacity with the State boxing commission?

A. I believe so.

Q. If I showed you what purports to be a signature, could you identify it?

A. In connection with the financial report?

Q. Yes; there is the signature of James J. Johnston; that paper was filed in your office as a part of the official papers required to be filed with your commission; is that so?

A. Yes.

Q. Is that the signature of James J. Johnston?

A. I didn't see him sign that paper.

Q. But have you ever seen him sign anything?

A. No; I don't think I have.

The COURT. You don't have to see a man sign if you are familiar with a man's signature.

48 The WITNESS. The papers are sent in all signed.

The COURT. Well, do you know whether that is the signature or not?

The WITNESS. I do not.

Q. But this is a report——

A. That is accepted by us as coming from the club; the Central Manhattan Boxing Club.

Q. Can you identify these papers as being filed with your commission?

A. These three papers here I can identify personally; this particular paper did not come into my hands [indicating].

Q. You were subpœnaed, or the commission was subpœnaed, to send over here or bring on the trial of this case all reports that were filed by James J. Johnston with your commission. Your commission has selected you as the witness to come over here with these reports?

A. Yes.

The COURT. You just stated a few moments ago, Mr. Witness, that this was one of the reports filed with your commission—not with you personally, but with the commission.

The WITNESS. That is correct.

The COURT. Then you can identify it as such?

The WITNESS. Yes.

Mr. McCOY. I ask to have these marked for identification.

(Marked "Government's Exhibits 3 and 4 for identification.")

Q. These are two similar papers for another date; can you identify those as being filed with your commission?

A. I can.

49 Q. What is the date?

A. April 13, 1921.

Q. And the others were March 2, February 28th, April 13th and April 15th.

The COURT. Which?

Mr. McCOY. The second set.

The COURT. If you don't keep them identified on the record and it becomes necessary to review the record, one would be perfectly blind as to what you are talking about.

Mr. McCOY. I ask to have those reports marked for identification.

(The second set referred to was marked "Government's Exhibits 5 and 6 for identification.")

Q. I show you here reports dated March 10th and March 12th and ask you if you can identify those as being filed with your commission?

A. Yes.

Mr. McCOY. I ask to have those reports marked for identification.

(Marked "Government's Exhibits 7 and 8 for identification.")

Q. Mr. Carr, I have here a report dated March 24th and a report dated March 26th; I show you these reports and ask you if you can

identify them as being submitted to your commission or filed with your commission?

A. I do.

Mr. McCoy. I ask that they be marked for identification.

(Marked "Government's Exhibits 9 and 10 for identification.")

Q. I also show you report dated March 31st and April 2nd, and ask you if you can identify them as being filed with your commission?

A. Yes.

50 Mr. McCoy. I ask that these reports be marked for identification.

(Marked "Government's Exhibits 11 and 12 for identification.")

Q. I show you also a report dated April 11 and ask you if you can identify those?

The Court. What year?

Mr. McCoy. 1921.

A. Yes.

Mr. McCoy. I ask that these reports be marked for identification.

(Marked "Government's Exhibits 13 and 14 for identification.")

Q. I show you report dated May 3rd and May 6th and ask you if you can identify them as being filed with your commission?

A. Yes.

Mr. McCoy. I ask that these reports be marked for identification.

(Marked "Government's Exhibits 15 and 16 for identification.")

Q. I show you a report dated May 19th and May 20th and ask you if you can identify those reports as being filed with your commission?

A. I do.

Mr. McCoy. I ask that these reports be marked for identification.

(Marked "Government's Exhibits 17 and 18 for identification.")

Q. Government's Exhibit 3 reports that there was a State

51 tax due of $309; Government's Exhibit 4 reports that there was also a State tax due of $309. Do you know whether those taxes were paid to your commission?

A. They were not; they were paid to the State treasurer.

The Court. They are not payable to your commission?

The Witness. They are not payable to my commission.

The Court. They make the reports to your commission, but they pay the money to the State treasurer?

The Witness. Yes, sir.

Q. Government's Exhibits Nos. 5 and 6 show that there was a State tax due of $252.50; do you know whether this tax was paid to the State treasurer?

A. It was.

Q. These are taxes on admissions, are they not?

A. Yes.

Q. I show you Government's Exhibits Nos. 7 and 8, which show that a State tax was due of $497, and ask you if those taxes were paid to the State treasurer?

A. Those taxes are one and the same thing; they were paid to the State treasurer, and also some additional tax.

Q. In other words, the tax in each one of these reports that I have shown you, these two reports are filed for one particular date?

A. One particular date.

Q. And the amount shown on each one of these reports is the amount of the admission tax which was due to the State for that contest, is that so?

A. Yes; sometimes more than that.

The COURT. How would that be?

The WITNESS. Where an error was made, in case there was an error made, and the club paid an additional tax.

52 Q. On Government's Exhibits Nos. 9 and 10, filed for the same date, it shows that a State tax of $284 was due; was that tax paid?

A. What date? The date of the contract?

Q. March 24th.

A. $291.85 was paid.

The COURT. What is the purpose of a double report every time or two different reports?

The WITNESS. One report contains all the information; it is not necessary to have two reports; there is only one report necessary to us, it is really the report of the boxers and judges, and on the back they happen to put that in. There is a financial report sent in separately to the cashier.

The COURT. That really requires only one financial report?

The WITNESS. One sent to us and one sent to the State treasurer.

Q. Government's Exhibits Nos. 11 and 12, two reports for the contest held on March 31st, show that a State tax of $687.65 was due the State treasurer; was that paid?

A. That was paid, sir.

Q. Government's Exhibits 13 and 14, filed for the contest held April 7th, show that there was a State tax due of $746.55; was that paid to the State treasurer?

A. That was paid to the State treasurer.

Q. Government's Exhibits Nos. 15 and 16 show that there was a State tax due of $245.15; was that paid to the State treasurer?

A. $252.50.

Q. So that this report was in error to the extent of a difference of $7 and some odd cents?

A. The amount paid was $252.50.

Q. How was that determined?

A. I determined it by checking up the accounts.

53 Q. In other words, this was not a correct report?

A. May have been some clerical error.

Q. The tax, however, was more?

A. The tax was $252.50.

Q. Government's Exhibits Nos. 17 and 18, filed for the contest held May 19th, shows that a State tax of $128.10 was due?

A. There was paid $151.25 to the State treasurer.

Q. So that this report was not correct?

A. No.

Q. The amount of tax is more than this report sets forth?

A. Yes.

Mr. McCoy. That is all.

Cross-examination by Mr. Coughlin:

Q. Mr. Carr, do you know by whom these reports that you identified were made out?

Mr. McCoy. I object to that, your honor; the reports specifically show by whom they were made out.

The Court. He could not, in the nature of things, know; the reports must show themselves by whom they were filed.

Mr. Coughlin. These were not offered in evidence yet.

Mr. McCoy. No; they are only marked for identification.

Q. Do you know, Mr. Carr, who filed these returns with the commission?

A. They are filed by an officer of the club; some officer of the club; we recognize nobody but clubs, incorporated clubs.

Q. Is there a regulation of the commission that requires any specific person to file this return?

The Court. Just a moment. What do you mean by that?

54 Do you mean to present it for filing or to make it out and subscribe it?

Mr. Coughlin. Subscribe it.

The Court. In whose name must a report be made?

The Witness. An officer of the corporation.

The Court. That specifically provides that the corporation must make a financial report to you?

The Witness. Yes, sir.

The Court. As to each exhibition?

The Witness. Always signed by an officer of the corporation.

By Mr. Coughlin:

Q. Among all the papers which you brought here under subpœna from the United States attorney did you bring the certificate of incorporation which is required to be filed by you?

Mr. McCoy. I don't think there is any certificate of incorporation required to be filed by Mr. Carr.

Mr. Coughlin. I withdraw the question.

The Witness. I brought all the papers connected with it.

Q. As an official of the New York State Boxing Commission, will you tell us whether it is necessary for an applicant for a license to conduct boxing exhibitions in New York State to file with the State commission a copy of its certificate of incorporation?

A. We do.

Q. Have you with you to-day the copy of the certificate of incorporation filed with you by the Central Manhattan Boxing Club?

A. Yes.

55 Q. Do you know whether it is necessary for any applicant for a permit to hold boxing exhibitions in New York State to

file with the New York State Commission an application for such license and permit?

A. Application is made to the commission.

Q. Have you with you to-day the original application made on behalf of the Central Manhattan Boxing Club for a license?

A. I believe so; yes.

Q. It is necessary for an applicant for a license or permit to hold boxing exhibitions in New York State to file with the New York State Boxing Commission a copy of any lease under which it intends to operate?

A. Yes.

Q. Have you with you to-day the copy of the lease which was filed with you pursuant to that regulation by the Central Manhattan Boxing Club?

A. I think so.

Mr. COUGHLIN. As soon as we can find those papeers I will offer them in evidence.

The COURT. Well, the witness very likely can find them for you.

The WITNESS. This is the application for a license by the Central Manhattan Boxing Club, Inc.

Q. Will you please detach the three papers that I have called for, the certificate of incorporation, the lease, and the application?

A. That is the application for the license dated November 16, 1920, the money filed with us November 16, 1920, of the Central Manhattan Boxing Club, Inc.

Mr. COUGHLIN. I offer that in evidence.

Mr. McCOY. You testify that this was filed with your commission.

The WITNESS. Yes, sir.

56 Mr. McCOY. I have no objection.

(Marked "Defendant's Exhibit B.")

The COURT. Now, he also asks you for the certificate of incorporation and the lease, if you can find them there.

The WITNESS. This is the lease of the Manhattan Casino, Inc. [producing paper].

Mr. COUGHLIN. I offer that in evidence.

Mr. McCOY. What does this mark here represent [indicating]?

The WITNESS. I do not know.

Mr. McCOY. Does it represent that it had been cancelled, void, or anything of that sort?

The WITNESS. I couldn't tell you exactly whether that is so or not; that paper did not come through my hands.

The COURT. Is this the original paper?

The WITNESS. The lease—H. S. Lyons, secretary of the license committee, handles these particular papers; he receives these papers; they don't come to me.

Mr. McCOY. Well, I would like to know a little more about this lease before it goes in evidence; this is simply a lease from the

Manhattan Casino to the Aathlettic Club of America; these two have nothing to do with the Central; Manhattan Boxing Club.

The COURT. If you object to it and it does not relate to this matter, well and good—he may have brought the wrong paper.

Mr. McCOY. We are dealing now with the Central Manhattan Boxing Club, and that does not appear in that paper at all.

Mr. COUGHLIN. Your honor, I asked the witness if he had with him the lease filed by the Central Manhattan Boxing Club.

57 The COURT. But he has produced a paper that evidently is a mistake—do you find another lease there?

The WITNESS. There is an assignment of a lease here also from the Manhattan Athletic Club to the Central Manhattan Boxing Club, Inc., dated November 23, 1920.

Mr. McCOY. That is the paper we want.

The COURT. That would be very likely just the paper that you want.

Mr. COUGHLIN. These two papers taken in conjunction, your honor, show the chain.

The COURT. That may be.

Mr. COUGHLIN. I offer them both in evidence.

Mr. McCOY. Well, now, this contains an application for a license. What do you want to get in evidence, the assignment of the lease?

Mr. COUGHLIN. The assignment of the lease and the lease.

Mr. McCOY. Well, here is the original lease between the Manhattan Casino and the Manhattan Athletic Club. Now, there are a number of papers included in this folder here.

Mr. COUGHLIN. I am offering in evidence the assignment and the lease.

Mr. McCOY. I have no objection.

(Marked "Defendant's Exhibit C.")

The WITNESS. This paper here is the certificate of incorporation of the Manhattan Athletic Club of America, Inc.; some of those papers are papers that we require to see before we would issue the license.

58 Q. Mr. Carr, the certificate of incorporation of the Central Manhattan Boxing Club, Inc., would necessarily have to be filed with your commission before a permit or license would be issued to the Central Manhattan Boxing Club, Inc.?

Mr. McCOY. I object to the form of the question.

Mr. COUGHLIN. He is not my witness.

The COURT. You have been asking this witness right along questions of law; you have been asking him to state to you the requirements of the statute, and there is never any necessity of asking a witness what the statute requires. The question you are now putting to him would be answered by the statute, and all you need is to repeat the statute.

Mr. COUGHLIN. I submit that that is a regulation of the commission and not a statute.

The COURT. Well, if it is a regulation of the commission, then the regulation of the commission is the best evidence and not the evidence of the witness.

Mr. COUGHLIN. I withdraw my last question.

Q. This certificate of incorporation which I have in my hand purports to be the certificate of incorporation of the Manhattan Athletic Club of America. Have you with you to-day a certificate of incorporation of the Central Manhattan Boxing Club, Inc., which was filed with the New York State commission?

A. It should be among those papers—I presume it is.

Mr. McCOY. Would you be able to locate it, Mr. Carr? I
59 have not been all through these papers, and I would like to assist counsel.

Q. This paper is one which was filed with the New York State Boxing Commission?

A. That is a copy of the one you have there already—application for license of the Central Manhattan Boxing Club—you have the application there already, the original, the application for the license; this is a copy of that.

Q. Well, included in that folder that you have there, is there a certificate of incorporation of the Central Manhattan Boxing Club?

Mr. McCOY. I will accept the paper as authentic as among the papers that were filed.

The WITNESS. Yes; this is a certificate of incorporation.

Mr. McCOY. May I see that, please?

The WITNESS. It is a copy.

Mr. COUGHLIN. I offer it in evidence.

(Marked "Defendant's Exhibit D.")

(At this point Mr. Coughlin read defendant's Exhibit B to the jury.)

Mr. McCOY. Your honor, it has been admitted by the attorney for the Central Manhattan Boxing Club that they did make application for this license, and a reading of a lengthy paper like this seems to me is taking up the time of the court unnecessarily.

The COURT. Well, Mr. District Attorney, you are just taking up time, because he has already completed it; you should have interposed the objection earlier.

Mr. COUGHLIN. That is all.

60 JOHN J. T. SMITH, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. McCOY:

Q. Are you a notary public, Mr. Smith?

A. I am.

Q. I hand you Government's Exhibit No. 3, which has on it the signature of James J. Johnston and your signature as notary public; can you tell me whether that is the signature of James J. Johnston?

A. Yes, sir.

Mr. McCoy. I offer this paper in evidence.

The Court. He hasn't told you whether it was.

Q. Is it the signature of James J. Johnston?

A. It is.

Mr. Coughlin. No objection.

(Government's Exhibit No. 3 for identification received in evidence.)

Q. Now, this report, it shows that a Federal tax of $618 is due; that is a report that is signed by Mr. Johnston?

A. Yes..

Q. That is all, Mr. Smith, for the moment, unless you acted as notary as to any other papers.

A. I don't know; I think you said, Mr. District Attorney, that you wanted me to identify some papers signed by Mr. O'Brien.

Q. I just want you to identify the papers that you acknowledged as notary public.

A. Yes, sir; I acknowledged that one; I can't say that there were any others.

Q. Apparently not; but in case I come across them I will have to recall you, if you will remain here.

A. Yes.

61 Louis Liebgold, called as a witness on behalf of the Government, being duly sworn, testifies as follows:

Direct examination by Mr. McCoy:

Q. What is your occupation, Mr. Liebgold?

A. Physical director.

Q. Were you ever employed by the State athletic commission?

A. Yes, sir.

Q. In what capacity?

A. Boxing inspector.

Q. Who were you employed by?

A. The State boxing commission; I was employed then as a boxing inspector.

Q. Mr. Liebgold, did you attend the contest at Manhattan Casino held by the Central Manhattan Boxing Club on the date of February 28, 1921—I show you this to refresh your recollection?

A. Yes.

Q. Attached to that report, Government's Exhibit 4; is that a report from you showing the number of tickets that were sold at that contest and is that your signature and is that your report?

A. Yes, sir.

Q. How did you determine the number of tickets sold at that contest?

A. Generally take a copy of the statement made by the counters on that night.

Q. Do you know who the counters were that night?

A. No, sir.

Q. Do you know the defendant, James J. Johnston?

A. Yes, sir.

Q. Did you see him that night?

A. Around the building I did.

Q. Did you see him in the box office?

A. No, sir.

Q. Well, do you know who the checkers that you worked with were employed by?

A. I guess they were employed by——

62 Q. No; do you know as a matter of fact?

A. No; I do not.

Q. Now, will you state to the jury how you determined the amount of tickets sold?

A. When the counter would count up the tickets, some one of those counters would make a report; I merely took a copy of that report and forwarded it to the commissioners, either that night or the next day, which was customary for a boxing inspector to turn in a report of the contest held that night.

Q. And the number of tickets sold?

A. The number of tickets sold, as they were counted up by the counters, I would take a copy and forward it to the commissioners.

Q. And you would send the amount of admissions received that night to the boxing commission, is that so?

A. Yes, sir.

Mr. McCoy. I offer this paper in evidence.

Mr. Coughlin. No objection.

(Government's Exhibit 4 for identification received in evidence.)

Mr. McCoy. That is all for the present, Mr. Liebgold, if you will wait for ten or fifteen minutes I may have to call you back again.

Joseph A. O'Brien, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. McCoy:

Q. Are you a notary public, Mr. O'Brien?

A. Yes.

63 Q. I show you Government's Exhibit 8 for identification; this report shows that there is a Federal tax due the Government of $707.20, and it is signed by James J. Johnston, and you appear to be the notary public; I want to know if that is James J. Johnston's signature?

A. Yes.

Mr. McCoy. I offer it in evidence.

Mr. Coughlin. No objection.

(Government's Exhibit 8 for identification received in evidence.)

Q. I show you another report in which there appears to be a Federal tax due the Government.

A. I don't know anything about that.

Q. The amount is $505 and this report is signed by Joseph M. O'Brien, and your name appears to be the notary public acknowledging that signature; is that Joseph M. O'Brien's signature?

A. Yes.

Mr. McCoy. I offer this in evidence.

(Government's Exhibit 6 for identification received in evidence.)

Q. Mr. O'Brien, I show you another report marked for identification here, Government's Exhibit No. 9, in which there appears to be a Federal tax due the Government of $568, signed by Joseph M. O'Brien; your name appears to be the notary public; is that Joseph M. O'Brien's signature?

A. Yes; I took that as notary public.

Mr. McCoy. I offer that in evidence.

Mr. Coughlin. No objection.

(Government's Exhibit No. 9 for identification received in evidence.)

64 Q. I show you another report, Government's Exhibit 11, for identification, in which there appears to be a Federal tax due the Government of $1,375.30, signed by Joseph M. O'Brien, and your name appears as notary; is that his signature?

A. Yes.

Mr. McCoy. I offer this in evidence.

(Government's Exhibit No. 11 for identification received in evidence.)

Q. You have acknowledged the signature of Joseph M. O'Brien on three or four occasions, have you not?

A. Yes.

Q. You can identify his signature when you see it, can you not?

A. Only from my own.

Q. Well, I have just submitted to you three reports in which you acknowledged his signature.

A. There is no doubt that the signature is Joseph M. O'Brien's, as I knew the signature of Joseph M. O'Brien.

Q. I show you here a report, Government's Exhibit No. 15 for identification, in which $490.30 appears to be due the Federal Government, and that is signed by Joseph M. O'Brien; can you recognize that signature?

A. I couldn't testify as to whether that was the Joseph M. O'Brien that signed the same ones before me.

Q. Well, I am referring to the signature.

A. It looks similar, as far as I know.

The Court. How can you tell any better to-day the Joseph M. O'Brien that you certified to, and this one, unless you know the signature?

The Witness. Well, I know the man and I know who he was connected with and some of the acknowledgments I think I filled out the position he occupied.

65 The Court. Then you ought to be able to testify to these.

Q. This is the same report signed with his handwriting?

A. Well, I say it looks the same as the signature on the other instrument that you showed me.

Q. I show you another report, Government's Exhibit No. 13, in which there appears to be a Federal tax due the Government of $1,493.10, signed by Joseph M. O'Brien; does that appear to be the same signature?

A. That looks similar to the other exhibit.

Mr. McCoy. I offer these two reports in evidence, Nos. 13 and 15 for identification.

Mr. Coughlin. No objection.

(Government's Exhibits Nos. 13 and 15 for identification received in evidence.)

Q. I show you another report, Government's Exhibit 17 for identification, in which there appears to be $256.20 due the Federal Government, signed by Joseph M. O'Brien; does that appear to be his signature?

A. That looks similar to the other.

Mr. McCoy. I offer that in evidence.

(Government's Exhibit No. 17 for identification received in evidence.)

Mr. McCoy. That is all.

Mr. Coughlin. No questions.

66 Daniel H. Skilling, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. McCoy:

Q. Were you a deputy commissioner of the State athletic commission?

A. I was.

Q. On April 13, 1921?

A. Yes, sir.

Q. I show you here a report marked "Government's Exhibit 5 for identification," to which is attached the report bearing your signature; can you identify that report?

A. Yes.

Q. Is that your report?

A. That is my report.

Q. Will you state to the jury how you arrived at the figures in the report?

A. After each contest we would have the men go in the office and count all the tickets——

The Court. Speak up louder.

The Witness. After each boxing contest we would have the men in the office count the tickets, the sold tickets; I supervised the counting after the sold tickets were counted, then I would supervise the counting of the unsold tickets, and turn in this report to the commission, who would have the printed report, and they could tell whatever tickets were missing and tax the club for those tickets.

Q. What was the amount of the admissions received that night according to your report?

A. $5,050.

Q. That was the amount of admissions paid?

A. The tickets in the box office.

Mr. McCoy. I offer this report in evidence.

Mr. Coughlin. No objection.

(Government's Exhibit No. 5 for identification received in evidence.)

Mr. McCoy. I believe that is all.

67 Leonard W. McClaurey, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. McCoy:

Q. Mr. McClaurey, were you employed by the State athletic commission in 1921?

A. Yes.

Q. In what capacity?

A. Inspector.

Q. Did you attend the boxing contest held at 158th Street and Eighth Avenue on March 20, 1921?

A. Who were the principals—I don't recall the date.

Q. Well, I will submit this paper to you to refresh your recollection; now state to the jury how you obtained that, how you arrived at those figures.

A. Why, I got hold of the tickets that were used, the sold tickets, and deducted those from the unsold tickets and that was verified, of course, by count, and the count was always supervised. That is the way this report was arrived at, to be sent to the commission when they checked back my report to see that it confirmed the printed report. That is, the tickets were all printed, and the used tickets, that is, the used and unused, it jibed with the tickets that were printed.

Q. Who did you work with, Mr. McClaurey, to get at these figures?

A. I worked with two different inspectors; I attended that place twice.

Q. Did you ever work with any of the employees of James J. Johnston, the defendant?

A. No.

Q. Did you work with the ticket sellers?

A. No.

Q. You just worked with your own inspectors, the inspectors of the commission?

A. Yes.

Q. I show you another report, Government's Exhibit 10 for identification, and ask you if you made out that report?

A. Yes; that is mine.

Q. Will you state the amount of admissions that were paid on that?

A. $4,071.

68 Q. The amount of admissions received?

A. Yes.

Mr. McCoy. I offer these reports in evidence.

Mr. Coughlin. No objection.

(Government's Exhibits 7 and 10 for identification received in evidence.)

Michael Wieder, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. McCoy:

Q. What is your occupation, Mr. Wieder?

A. Deputy clerk, United States Internal Revenue.

Q. It was a part of your official duties, Mr. Wieder, to investigate amusement enterprises, to see whether or not they have made proper returns to the Bureau of Internal Revenue for admission taxes, isn't that so?

A. Yes, sir.

Q. Did you have occasion to investigate the affairs of the Central Manhattan Boxing Club?

A. I did.

Q. Why is it that you had to investigate it?

A. Well, there was no special reason. I have charge of all the admission taxes in my district about 110th Street, and the Central Manhattan Boxing Club conducted their affairs at 158th Street and Eighth Avenue, and it is in my district, and I was sent there by the chief, Mr. Carew, who must have had a complaint on it, something to that effect—that I don't know.

Q. You don't know any reason why you were sent there to investigate?

A. That I don't know.

69 Q. As a matter of fact, you did go there and investigate, did you not?

A. Yes.

Q. Will you state to the court and jury what you found upon investigation?

A. Well, I found no one there that I could talk to concerning the Central Manhattan Boxing Club, and from my investigations I understood that Mr. Johnston was the one that was running the corporation, and I addressed a letter to Mr. Johnston, to some address that I was told by someone in charge of the Casino, and I received no answer. I then went down to the State boxing commission to get the amounts paid by the club to the State, which is 5 per cent of the gross receipts.

Q. But did you first find out that there had been any return?

A. Before that I first went down to our office down in the customhouse, where we keep our records, to find out whether the Central Manhattan Boxing Club had paid a tax for the months of March, April, and May, during which time I understood they had been

running boxing bouts. I found that no payments had been made. The only payment that had been made was the one in November.

Q. Did you find that a return had been filed?

A. I found that none had been filed.

Q. So in the absence of any return having been filed, they couldn't have paid any tax?

A. No.

Q. They first had to file a return?

A. You pay the tax at the time you file the return.

Q. But the filing of the return——

A. You file the return and pay the taxes the same time.

Q. And filing a return is a prerequisite to paying?

A. You must file the return and pay the tax at the same time.

The COURT. Had a return been made for November?

70 The WITNESS. Yes, the tax had been paid.

The COURT. But no returns for any subsequent period?

The WITNESS. No returns for any subsequent date.

Q. Do you know who paid the tax for the November contest?

A. No.

Q. Do you know whether any tax was paid to the Government for the months of February, March, April, and May, 1921?

A. I know from my investigation of the records that none has been paid.

Q. Did you then go to the State boxing commission to find out whether or not a State admission tax had been paid?

A. Yes.

Q. And did you find out there that a State admission tax had been paid.

A. Yes.

Q. What were the amounts that you found? First, did you get them?

A. Yes, I got the amounts.

Q. You got the amounts from the records on file?

A. From Mr. Carr, the cashier, I got them.

Q. Could you identify the records if they were shown to you, from which they were made?

A. Mr. Carr gave them to me from his book that he kept.

The COURT. Mr. Carr gave you a memorandum?

The WITNESS. He gave me a memorandum from his cash book of the amounts received.

The COURT. And the Federal tax is just double the State tax?

The WITNESS. Yes.

Q. The State tax is a tax of 5 per cent?

A. Yes.

Q. And that tax is to be paid out of the admission fee, isn't that so?

A. The State tax?

71 Q. The State tax is paid out of the admission fee?

A. I don't know the regulations of the State; I understand that the tax is 5 per cent on the admissions; I don't know what the regulations are.

Q. But the Government tax is separate and distinct from the admission fee?

A. Yes, 10 per cent.

Q. 10 per cent in addition to the admission fee?

A. Yes.

Q. Mr. Wieder, I will submit to you a report; is that your report?

A. Yes, sir.

Q. That report was made in your official capacity after your investigations?

A. Yes, sir.

Q. Will you state what amount you found to be due to the Federal Government for contests held in the months of February, March, April, and May, 1921?

A. For the month of February I found that $618 was due; the tax was $618. The penalty for failure to file the return was $154.30, making a total of $803.30 due the Government for the month of February.

Q. The penalty attaches if the return is not filed?

A. If not filed on time.

Q. And the specified time for filing the return is the last day of the succeeding month?

A. Yes, sir.

Q. In which the tax is due?

A. Collected.

Q. Now, what did you find for the month of March?

A. For the month of March the tax should have been $2,937.30; 25 per cent would be $734.32; 12 per cent additional, making it $146.86, making a total of $3,818.48 for the month of March. For the month of April the tax due was $1,998.10; the penalties were $499.52 and $99.90, making a total of $2,597.52. For the month of May the tax was $850.50; the penalties were $212.62 and $42.32, making a total of $1,105.44.

72 Q. What is the grand total of the amount of tax that you found to be due the United States Government for admissions to contests held by the Central Manhattan Boxing Club during the months of March, April, and May?

A. Including penalties?

Q. Including penalties.

A. $8,324.84.

Q. And those taxes were never paid to the United States Government, is that correct?

A. Yes.

Mr. McCoy. That is all.

Cross-examination by Mr. Coughlin:

Q. Mr. Wieder, do you know whether there has been filed in your office any notice in compliance with Regulation 43, article 64, from the office of the Internal Revenue Department, notifying the collec-

tor that a lease had been made by the Central Manhattan Boxing Club to James J. Johnston, and that he agreed to be responsible for the payment of the admission tax?

A. No, sir.

Mr. McCoy. I object to that question; he is not presumed to know anything about leases being filed; he is a Government internal revenue collector.

Mr. Coughlin. I have a right to ask him if it is within his knowledge.

The Court. He states he doesn't know.

The Witness. I don't know of any such notification.

Q. If any such notification had been filed, would you know about it?

A. No, sir.

Q. Have you examined the complete file of all the papers relating to the Central Manhattan Boxing Club?

A. Only relating to the payment of taxes.

Mr. Coughlin. That is all.

73 Joseph Steinberg, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McCoy:

Q. What is your occupation, Mr. Steinberg?

A. Deputy collector, United States Internal Revenue Department.

Q. In your capacity as deputy collector of internal revenue, you have occasion to examine the reports and to know whether or not admission taxes have been paid at various amusement enterprises?

A. Well, I do not exactly examine the reports, but we have a record of knowing whether a tax has been paid or not; we have a record of that in the office.

Q. Do you know whether or not the Central Manhattan Boxing Club has ever paid a tax to the United States Government for admissions?

A. For what period?

Q. For the period of February, 1921, to May 19th, 1921.

A. There is a record of a part payment of a tax amounting to $250 for that period.

Q. What was the amount due the United States Government for that period?

A. The tax amounted to $6,300 and some odd, and there was 25 per cent and a 5 per cent penalty assessed.

Q. Making a total amount of taxes due of what?

A. I don't remember the total.

Q. If I show you a report of Mr. Wieder, would that refresh your recollection?

A. Yes—a total of $8,324.84.

The Court. Are you able to say who made this partial payment of $250?

The WITNESS. No, I couldn't say who made the payment;
74 there is a payment in the name of the Central Manhattan Boxing Club of $250.

The COURT. Wasn't that in the previous November?

The WITNESS. No, it is not. It is not included, the previous payment; it was made several months later—in fact, quite a few months later.

Q. When was it made?

A. About August 8th or 9th.

The COURT. Of this year?

The WITNESS. Of this year.

Q. And you don't know who made that payment?

A. No, I don't know who made that payment. I have a record there and it is noted as a part payment for the Central Manhattan Boxing Club and amounts to $250.

Q. And there is a balance due?

A. A balance due of the difference between $8,000 and $250.

Q. Which has never been paid?

A. Which has never been paid.

Mr. McCOY. That is all.

Cross-examination by Mr. COUGHLIN:

Q. Mr. Witness, are you familiar with the records of your office concerning notices filed by lessors, to the effect that a lease has been made of a place where admission taxes may become due, and giving the name of the lessee for the purpose of advising the collector?

A. There is a particular form, I think I know what you refer to, it is marked notification by the lessor that the lessee will be responsible for the tax.

75 Q. Mr. Witness, I ask you if you are familiar with the records of your office?

A. I am familiar with the records of the office concerning that form.

Q. Do you know whether any such notification has been filed with your office by the Central Manhattan Boxing Club, naming James J. Johnston as the lessee, and the person to be held responsible?

A. No such form was filed.

Mr. COUGHLIN. That is all.

Redirect examination by Mr. McCOY.

Q. Mr. Steinberg, when a form of that sort that you have just mentioned is not filed, what does that amount to; is it a violation?

A. It would be a violation, positively.

Q. Is it serious?

The COURT. Does the law require it, or the regulations?

The WITNESS. The regulations require it; we would call it a technical violation, and it carriers a fine of $10 or so on the part of the party who fails to file it.

Q. But, in any event, the law specifically says, or the regulations specifically say, that the one who collects the tax, actually receives the money, is the one who is responsible for paying that tax?

A. Yes, that party would be responsible for the payment of that tax.

Q. Regardless of whether any notice has been given to the Bureau of Internal Revenue, as to whether a lessee is in charge of a building?

A. Regardless of that fact.

The COURT. I suppose, under the law, as soon as this tax is
76 collected, the tax being a separate thing from the admission fee, as soon as that tax is collected by anyone, it is property of the United States.

The WITNESS. It is the property of the United States. There are certain taxes to be collected by parties specified under certain sections of the law; in fact, they really become agents of the Government for the collection of that tax, and the tax on admissions is one of those. There were several others; for instance, the tax on transportation.

Q. And the luxury tax is another?

A. Section 904, I think it is.

The COURT. And whoever collects those taxes becomes an agent of the Government?

The WITNESS. Really become an agent of the Government. That is proven by the fact that if that party is unable to collect the tax the Government will aid him, and, in fact, collect it for him.

By Mr. McCOY:

Q. But as soon as he collects that tax it never becomes his money, does it, it is always the Government money?

A. It is the Government's money. There is a corresponding duty on the part of the party who is paying for admissions also to pay that tax, and if he refuses to pay it he is violating the law.

Recross-examination by Mr. COUGHLIN:

Q. Mr. Steinberg, on that regulation, Article 64, concerning notification by a lessor, is it not a fact that there is included in
77 that regulation a statement to the effect that where such notice is not given, then the tickets must be the tickets of the lessor; are you familiar with that regulation?

A. No.

Q. I show you this to refresh your recollection; can you now say?

A. Well, as I read this section, the lessee is responsible for the collection of the tax and the lessor has the privilege of filing this form to relieve himself.

Q. Will you answer my question concerning the tickets?

The COURT. But the failure to pay the tax makes the party receiving it responsible to the Government.

The WITNESS. The party collecting the tax is the one responsible to the Government—now, what is your question, please?

Q. Is it not a part of that same regulation that where no such notification is made, then it is the duty of the lessor to use his own tickets?

A. No; as I read this section, if the lessor assumes the duty of paying this tax and collecting it, then his ticket must be used.

Q. That is your interpretation?

A. Here it is right here, if the lessor assumes such responsibility his ticket shall be used.

Q. Is that your recollection of the regulations; is that correct in your estimate?

Mr. McCOY. It is not his recollection; it is the regulation itself.

The WITNESS. I am reading from this section, article 64.

Mr. COUGHLIN. I am handing the witness this section to refresh his recollection.

78 The COURT. But you have asked him what the regulation was and he is reading from it.

Mr. COUGHLIN. That is all.

Mr. McCOY. That is the Government's case, your honor.

Mr. COUGHLIN. The defendant moves to advise the jury to acquit the defendant on the ground that the Government has failed to establish a case against him; that the evidence is insufficient to warrant a conviction.

On this motion I would like to call to your honor's attention the fact that there has been absolutely no proof presented here that the defendant Johnston received any part of the moneys paid as an admission or as admission taxes for the exhibitions concerning which this charge is brought.

All of the statutes, the three statutes upon which they base the liability of Johnston, require that he at some time receive the money, the tax.

As to the embezzlement charge, he cannot be charged with embezzlement of Government funds unless you have some evidence that he received Government funds. I maintain that the Government has failed, by any evidence, to show that Johnston received any of the funds that were paid for admission taxes and that that failure is sufficient to warrant the jury to acquit.

The COURT. I think your motion is ignoring a number of these reports that have been put in evidence here, as well as certain of the oral evidence. Of course, you understand that if I am one that controls a transaction, and the money is paid over to one

79 that I have directed to receive it, I am responsible for that money, and if it is used, at my direction, for a purpose other than that which is required under the law that it shall be used—in this instance, for the payment of taxes—I am the guilty party, because it has been done under my direction. I do not need to do this directly or individually myself.

There are a number of reports here that were put in under the name of Mr. Johnston, and others under the name of Mr. O'Brien, whom the evidence tends to show was Mr. Johnston's employee, showing, upon their face, the receipt of an amount of money as and for the very tax that is involved here. Now, upon the face of those reports this money went into the hands of Johnston; he cannot avoid the responsibility because he may have turned over to somebody else and directed someone else to make use of them other than that which the law destined for them.

The motion will be denied.

Mr. COUGHLIN. Exception. The defendant also excepts to the remarks of the court in ruling on this motion, on the ground that they are prejudicial to the defendant and unwarranted.

The defendant rests.

80 (Mr. Coughlin sums up to the jury on behalf of the defendant.)

(Mr. McCoy sums up to the jury on behalf of the Government.)

(Thereupon the court instructed the jury without exception on the part of defendant.)

(The jury retired and returned with a verdict of guilty on all twelve counts, earnestly recommending that the defendant be given the mercy of the court.)

Mr. COUGHLIN. Your honor, the defendant moves to set aside the verdict, for a new trial, and to arrest judgment on the ground that the verdict is contrary to law and contrary to the evidence.

The COURT. Each of which motions will be denied.

Mr. COUGHLIN. Exception.

(Sentence deferred until Thursday, November 9th, 1921.)

Colloquy between court and counsel

NEW YORK, *December 3, 1921.*

Mr. SAGER. As your honor knows, I did not represent the defendand at the trial and he has not been able to procure a transcript, but the money we have collected we have paid in.

The COURT. You do not need any transcript.

Mr. SAGER. I do not know what occurred on the trial, but I want to make two motions, one for an arrest of judgment, first on the ground that the indictment does not state or allege an of-

81 fense under the United States laws or statute of the United States, and that neither count of the twelve counts of the indictment states an offense against the United States Government or under the laws or statutes of the United States.

I also want to make a motion to set aside the verdict.

The COURT. Well, I would make one at a time.

Mr. SAGER. All right, your honor.

The COURT. What is your other motion?

Mr. SAGER. A motion to set aside the verdict and grant a new trial on the ground that the verdict is against the evidence and

against the law, and on the further ground that the court erred in his charge to the jury, and that counsel for the Government—

The COURT. Of course you understand that a motion on that ground cannot rest where there was no exception taken to the charge.

Mr. SAGER. Well, I do not know what happened.

The COURT. Well, I can tell you there was no exception taken at all.

Mr. SAGER. Well, I want to get it in the record, anyhow.

The COURT. Yes.

Mr. SAGER. On the ground that counsel for the Government made improper remarks to the jury in his summation, and especially with reference to this statement, in effect, that a certain witness named Joe O'Brien had been subpœnaed to attend and had not appeared, and that the defendant had failed to put him on the stand.

I simply want to get the formal motion on the record.

82 The COURT. Your motions will be denied. Exceptions.

Judgment

NEW YORK, *December 5, 1921.*

The COURT. The judgment of the court is that the defendant be imprisoned for the period of sixty days, and that he pay a fine in the sum of $500.

GOVERNMENT EXHIBIT 1

11/3/21

Agreement, entered into this 26 day of November, nineteen hundred and twenty, by and between Central Manhattan Boxing Club, Inc., duly incorporated under the laws of the State of New York, party of the first part, and James J. Johnston, party of the second part:

WITNESSETH:

For valuable consideration and the sum of one dollar herewith paid in hand to each other by the parties to this agreement, the receipt whereof is hereby acknowledged, it is hereby agreed as follows:

The party of the second part being desirous to exclusively conduct boxing contests as the agent, matchmaker, and manager of the Central Manhattan Boxing Club under the charter and license held by it for the period of one year from the date hereof, and the party of the first part being agreeable to such exclusive arrangement, it is understood by the parties hereto that the following arrangement shall hold good during the life of this agreement.

83 The party of the second part agrees to pay to the party of the first part $750.00 a month, except that for the months of

July and August the sum of $500.00 is to be paid, for the aforesaid exclusive arrangement.

The party of the second part agrees to hold at least one boxing contest each month, and agrees to pay to the party of the first part $400.00 one week prior to the day set for each contest, and $350.00 on the evening of the contest, except that in July and August the sum of $100 is so payable, or the said sums are due and payable in full on the last day of the month if no contest is held.

In the event of the postponement of any boxing contest from a date mutually agreed upon in any month, $250.00 is to be paid to the party of the first part by the party of the second part; and provided a later date in the same month or in the first week of the ensuing month may be had, for which the said sum of $750.00 is to be paid as above set forth.

It being at all times understood and agreed that the party of the second part agrees to hold a boxing contest each calendar month, so that if a contest is arranged for a particular day of a month and it is not held during that month or in the first week of the ensuing month, then and in that event the sum of $500, in addition to the aforesaid sum of $250.00 is due and payable to the party of the first part, or if no date for a contest is set in a month, then the sum of $750.00, except in the months of July and August when the sum of $500.00 is to be paid to the party of the first part for the aforesaid exclusive right herein given to the party of the second part.

The party of the second part also agrees to pay the State tax of 5% and the Federal tax of 10%.

84 It is further agreed that the party of the second part shall pay the premium of the bond to be given by the club and the license fee of $750.00. The party of the second part agrees to reimburse the party of the first part for any monies necessarily paid out arising out of a penalty imposed by the commission for the failure to comply with the rules and regulations of the commission, or the provisions of the State boxing law, or in contesting any such proceeding or action brought by the commission or any agent or employee of the party of the second part.

It is further understood and agreed that in the event of the party of the first part exercising its power to terminate this contract, that it shall pay to the party of the second part the pro-rata amount of the premium on the bond and license fee for the unexpired term of this contract.

More than one contest may be held in any one month and the sum of $500 is payable—$400.00 in advance as above set forth and $100 on the evening of the contest.

The party of the first part agrees, in consideration of the above, to furnish the large hall of the Manhattan Casino, lighted and heated, and with seats, boxes, and ring all arranged for a boxing contest, as heretofore used.

It is further understood and agreed that the ticket takers and ticket sellers employed by the party of the second part shall be paid

by him and also the contestants and officials, i. e., referee, physicians, timekeepers, announcers, ushers, etc., and the necessary gloves and all other expenses incurred in the conduct of said contest shall be paid and furnished by the party of the second part.

It is further agreed that each contract or agreement made
85 with contestants, officials, ticket sellers, and other help employed by the party of the second part, shall specifically provide that payments of all moneys shall be made by the party of the second part and that he shall be solely responsible.

All dates for conducting boxing shows must be mutually agreeable to the parties hereto.

This contract shall remain in force during the life of the present license held by the Central Manhattan Boxing Club, Inc., but may be terminated by either party by the giving of ninety days' written notice.

The party of the second part is to have entire charge of the handling and selling of all tickets and shall have exclusive control of all complimentary and press tickets.

This contract is not assignable by the party of the second part.

It is hereby mutually agreed between the parties of the first part and the parties of the second part of this contract that the parties of the second part agree to deliver or to give to the parties of the first part as many complimentary tickets as is consistent with the amount permitted by the rules and regulations of the Boxing Commission of the State of New York, inclusive of 3 balcony boxes and one ring side box

CENTRAL MANHATTAN BOXING CLUB, INC.,
By ELBERT O. SMITH, *Secretary.*

In presence of:
F. C. HAYDEN.

JAMES J. JOHNSTON. [L. S.]

86 The above typewritten insert was drawn up in the office of and at the request of J. J. Hagan and was made a condition to his entering into his agreement to guarantee performance by party of second part.

J. J. JOHNSTON.

Witness.

GOVERNMENT EXHIBIT 2

11/4/21

MAY 19, 1921.

Received from James J. Johnston nine hundred and fifty-two dollars in full payment to date for Manhattan Casino.

If check goes through.

$952 00/00.

F. C. HAYDEN,
For Cent. Man. Box. Club.

87 GOVERNMENT EXHIBIT 3

11/4/1921

New York State Boxing Commission

Corporation report after contest

This report must reach the boxing commission not later than 72 hours after the contest herein described. This report must be typewritten.

Report of Central Manhattan Boxing Club, corporation of exhibition held at Manhattan Casino, 155th Street & 8th Ave., New York City, N. Y., on February 28th, 1921

The following are the names of all boxers taking part, duration of bouts, decisions, payments made to boxers:

Boxers	License No.	Rounds	Decisions	Payments to boxers
Jimmy Kane	187	10	Won	$500.00
Packey Hommey	1231	10	Lost	400.00
Charley Beecher	136	10	Won	2,000.00
Freddie Jacks	418	10	Lost	1,000.00
Morris Lux	2966	10	Lost	750.00
Marty Summers	68	10	Won	1,250.00
Charley Hayes	924	10	Lost	600.00
Charley Pilkington	407	10	Won	1,000.00
				7,500.00

Judges	License No.	Referees	License No.	Chief seconds	License No.
George Schegler		Tommy Smith		Louis Fink	
Sam Jacobs		Harry Stout		Charley Rose	
				Louis Fink	
				Joe Malone	
				Dyer Dallins	
				Joe Woodman	
				Joe Woodman	

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Gross receipts	$3,815.00
Net receipts	$2,888.00
State tax	$309.00
Federal tax	$618.00
Complimentary tickets and press	415
Working press tickets	20

JAMES J. JOHNSTON of the above corporation appearing before me this 3rd day of March, 1921, deposes and says that the above statements are true to the best of his knowledge and belief.

JAMES J. JOHNSTON.

Subscribed and sworn to before me this 3rd day of March, 1921.

JOHN J. T. SMITH,
Notary Public (No. 244), New York County.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

On the 3rd day of March in the year 1921, before me personally came James J. Johnston, to me known, and being by me duly sworn

did depose and say that he resides in county of New York; that he is the matchmaker of The Central Manhattan Boxing Club, the corporation described in and who executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of
89 the board of directors of said corporation, and that he signed his name thereto by like order.

JOHN J. T. SMITH,
Notary Public (No. 244), New York County.

To be filed and made a part of this report.
Copy of report to State treasurer.
Referee's reports:
Referees.
Physicians.
Judges' cards.
Weights.
(The boxing commission furnishes blanks for all the above and these reports must be filed with the corporation report.)

90 GOVERNMENT EXHIBIT 4

11/4/1921

New York State Boxing Commission

Received Mar. 9, 1921.
Referred to_____per Sec'ty.

To the STATE TREASURER, Albany, N. Y.

The undersigned, complying with the provisions of section 25 of chapter 912 of the Laws of 1920, makes the following report:

I. Name of club: Central Manhattan Boxing Club.
II. Address: 8th Avenue & 155th Street, New York.
III. Date of contest: February 28th, 1921.
IV. Names of contestants.
Charley Hayes, vs. Charley Pilkington.
Charley Beecher, " Freddie Jacks.
Jimmy Kane, " Packey Hommey.
Marty Summers, " Morris Lux.
V. Number of tickets sold and gross proceeds thereof:

50 No. 1 to No. 50	General admission at	$ 2.00	$	100.00
141 No. 1 to No. 141	Reserved seats at reduced from $5.	$ 3.00	$	423.00
284 No. 1 to No. 284	Reserved seats at	$ 3.00	$	852.00
70 No. 1 to No. 70	Reserved seats at	$ 5.00	$	350.00
195 No. 1 to No. 195	Reserved seats at	$ 5.00	$	975.00
34 No. 1 to No. 34	Reserved seats at	$10.00	$	340.00
	Complimentary Gross	$		$3,140.00
	Total			$6,180.00
				5%
			$	309.00

Number of press tickets issued, 213 at $10.00, 73 at $5.00.
Number of complimentary tickets issued, 129 at $5.00.

91 VI. No contest other than the foregoing has been held by the undersigned since rendering its last report.

VII. No person without a ticket was admitted to the contest on the above mentioned date, and the foregoing is a true and correct statement of the total number of tickets issued, sold and exchanged in connection with said contest, and of the amount of the gross receipts of all tickets sold for said contest, and any other revenue.

Dated March 2nd, 1921.

By ELBERT O. SMITH, *Secretary.*

EDITH M. WOJAN.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

ELBERT O. SMITH, being duly sworn says that he is the secretary treasurer of the above named corporation and as such is authorized to make this report; that he has read the foregoing report, knows the contents thereof, and that the same is true to his knowledge.

ELBERT O. SMITH.

Sworn to before me this 2nd day of March, 1921.

EDITH M. WOJAN,
New York County, Commissioner of Deeds, City of New York.

N. Y. Cty. Clerk's No. 194
N. Y. Cty. Reg's. No. 22072
Comm. Expires July 13, 1922.

92 GOVERNMENT EXHIBIT 5

11/4/21

Boxing commission copy

To the STATE TREASURER, *Albany, N. Y.:*

The undersigned, complying with the provisions of section 25 of chapter 912 of the laws of 1920, makes the following report:

I. Name of club: Central Manhattan Boxing Club.
II. Address: 155th Street & 8th Avenue, New York City, N. Y.
III. Date of contest: April 13th, 1921.
IV. Names of contestants

Ted "Kid" Lewis,	vs.	Augie Ratner.
Charley Hayes,	"	Eddie James.
Artie Pierce,	"	Joe Hopkins.
Vic McLoughlin,	"	"Red" Allen.

V. Number of tickets sold and gross proceeds thereof:

215	No. 1 to No. 215	General admissions at	$1.00	$ 215.00
5	No. 1 to No. 5	Reserved seats at	$3.00	$ 15.00
249	No. 1 to No. 249	Reserved seats at	$3.00	$ 747.00
16	No. 1 to No. 16	Reserved seats at	$5.00	$ 80.00
129	No. 1 to No. 129	Reserved seats at	$5.00	$ 645.00
162	No. 1 to No. 162	Reserved seats at	$7.00	$1,134.00
17	No. 1 to No. 17	Reserved seats at	$7.00	$ 119.00
11—$3.00		Tickets exchanged at	$5.00	$ 24.20
9—$5.00		Tickets exchanged at	$7.00	$ 19.80
		Total		$2,999.00
Number of press tickets issued, 150—$7.00; 105—$5.00; Number of complimentary tickets issued, 43—$7. 37—$5.				
		Comp gross		2,051.00
				$5,050.00
				5%
				$252.50

93 VI. No contest other than the foregoing has been held by the undersigned since rendering its last report.

VII. No person without a ticket was admitted to the contest on the above mentioned date, and the foregoing is a true and correct statement of the total number of tickets issued, sold and exchanged in connection with said contest, and of the amount of the gross receipts of all tickets sold for said contest, and any other revenue.

Dated April 15th, 1921.

By JOSEPH M. O'BRIEN,
Asst. Treasurer.

94 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

JOSEPH M. O'BRIEN, being duly sworn says that he is the asst. treasurer of the above named corporation association and as such is authorized to make this club report; that he has read the foregoing report, knows the contents thereof, and that the same is true to his knowledge.

JOSEPH M. O'BRIEN.

Sworn to before me this 15th day of April, 1921.

JOSEPH A. O'BRIEN,
Notary Public, Kings County.
Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
Kings Co. Register's No. 2085.
New York Co. Clerk's No. 92.
New York Co. Register's No. 2048.
Term expires March 30, 1922.

95 GOVERNMENT EXHIBIT 6

11/4/1921

New York State Boxing Commission Corporation report after contest

This report must reach the boxing commission not later than 72 hours after the contest herein described. This report must be typewritten.

Report of Central Manhattan Boxing Club, corporation of exhibition held at 155th Street & 8th Avenue, New York City, N. Y., New York, on April 13th, 1921

The following are the names of all boxers taking part, duration of bouts, decisions, payments made to boxers:

Boxers	License No.	Rounds	Decisions	Payments to boxers
Ted "Kid" Lewis		15	No	$911.69
Augie Ratner		15	Yes	599.80
Charley Hayes		10	No	300.00
Eddie James		10	Yes	300.00
Artie Pierce		6	Yes	50.00
Joe Hopkins		6	No	50.00
Vic McLoughlin		6	Yes	50.00
"Red" Allen		6	No	50.00
				$2,311.49

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Judges	License No.	Referees	License No.	Chief seconds	License No.
Sam Jacobs		Moe Smith		Charles Harvey	465
Liebgold		Artie McGovern		Frank Bagley	479
				Harry Jackson	
				Paul Bracken	
				M. Ladisky	
				Paul Bracken	
				Jack Moore	

Gross receipts	$85,555.00
Net receipts	$2,999.00
State tax	$252.50
Federal tax	$505.00

Complimentary tickets, 43 @ $7.00; 37 @ $5.00.
Working press tickets, 150 @ $7.00; 103 @ $5.00.

JOSEPH M. O'BRIEN, asst. treasurer of the above corporation appearing before me this 15th day of April, 1920, deposes and says that the above statements are true to the best of his knowledge and belief.

JOSEPH M. O'BRIEN.

Subscribed and sworn to before me this 15th day of April, 1920.

JOSEPH A. O'BRIEN.

97 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

On the 15th day of April in the year 1921, before me personally came Joseph M. O'Brien, to me known, and being by me duly sworn, did depose and say that he resides in borough of Manhattan, New York; that he is the asst. treas. of Central Manhattan Boxing Club, the corporation described in and who executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

JOSEPH A. O'BRIEN,
Notary Public.

To be filed and made a part of this report.
Copy of report to State treasurer.
Referee's reports:

Referees.
Physicians.
Judge's cards.
Weights.

(The boxing commission furnishes blanks for all the above and these reports must be filed with the corporation report.)

98 GOVERNMENT EXHIBIT 7

11/4/1921

New York State Boxing Commission

Received Mar. 14, 1921.
Referred to_____per Sec'ty.

To the STATE TREASURER, *Albany, N. Y.:*

The undersigned, complying with the provisions of section 25 of chapter 912 of the Laws of 1920, makes the following report:

I. Name of club: Central Manhattan Boxing Club.
II. Address: 155th Street & 8th Avenue, New York City, N. Y.
III. Date of contest: March 10th, 1921.
IV. Name of contestants:

Jack Goldie,	vs. Arthur Pierce.
"Kid" Wolf,	" Frankie Daly.
"Battling" Levinsky,	" Homer Smith.
"Kid" Norfolk,	" Pinkey Lewis.

V. Number of tickets sold and gross proceeds thereof:

200	No. 1 to No. 200	General admissions at	$1.00	$200.00
459	No. 1 to No. 459	Reserved seats at	$3.00	$1,337.00
541	No. 1 to No. 541	Reserved seats at	$5.00	$2,705.00
327	No. 1 to No. 327	Reserved seats at	$7.00	$2,289.00
		Reduced from 5.00 to		

137 No. 1 to No. 137	Reserved seats at	$3.00	$411.00
23—3.00	Tickets exchanged at	$5.00	$46.00
2—5.00	Tickets exchanged at	$7.00	$44.00
			$7,872.00
	Complimentary tax		$2,868.00
	Total		$9,940.00
			5%
			$497.00

Number of press tickets issued, 331 at $7.00; 43 at $5.00.
Number of complimentary tickets issued, 36 at $7.00; 7 at $5.00.

99 VI. No contest other than the foregoing has been held by the undersigned since rendering its last report.

VII. No person without a ticket was admitted to the contest on the above mentioned date, and the foregoing is a true and correct statement of the total number of tickets issued, sold, and exchanged in connection with said contest, and of the amount of the gross receipts of all tickets sold for said contest, and any other revenue.

Dated March 12th, 1921.

By JOSEPH M. O'BRIEN,
Asst. Secretary.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

JOSEPH M. O'BRIEN, being duly sworn, says that he is the asst. secretary of the above named corporation
association and as such is authorized to make this club
report; that he has read the foregoing report, knows the contents thereof, and that the same is true to his knowledge.

Sworn to before me this 14th day of March, 1921.

JOSEPH A. O'BRIEN,
Notary Public, Kings County.

Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
Kings Co. Register's No. 2085.
New York Co. Clerk's No. 92.
New York Co. Register's No. 2048.
Term expires March 30, 1922.

100 GOVERNMENT EXHIBIT 8

11/4/1921

New York State Boxing Commission

Received Mar. 14, 1921.
Referred to----------per Sec'ty.

New York State Boxing Commission

Corporation report after contest

This report must reach the boxing commission not later than 72 hours after the contest herein described. This report must be typewritten.

Report of Central Manhattan Boxing Club, corporation of Exhibition held at Manhattan Casino, 155th Street & 8th Avenue, New York City, N. Y., on March 10th, 1921

The following are the names of all boxers taking part, duration of bouts, decisions, payments made to boxers:

Boxers	License No.	Rounds	Decisions	Payments to boxers
Jack Goldie		6		35.00
Arthur Pierce		6	Yes	50.00
"Battling" Levinsky		12	Yes	1,250.00
Homer Smith		12		1,070.00
"Kid" Wolfe		12	Yes	850.00
Pinkey Lewis		12		1,500.00
"Kid "Norfolk		12	Yes	1,500.00
				6,205.00

101 Judges	License No.	Referees	License No.	Chief seconds	Licens e No.
Thos. Shortell		Dan Hickey		Joe Golding	
		James Savage		Joe McKenna	
				Dan Morgan	
				Joe Golden	
				"Doc" Bagley	
				Tom O'Rourke	
				Leo P. Flynn	
				Joe Woodman	

Gross receipts	$8,209.40
Net receipts	$6,718.40
State tax	$ 497.00
Federal tax	$ 707.20

Complimentary tickets, 36 at 7.00; 7 at 5.00.
Working press tickets, 331 at 7.00; 43 at 5.00.

JAMES J. JOHNSTON, of the above corporation, appearing before me this 14th day of March, 1921, deposes and says that the above statements are true to the best of his knowledge and belief.

JAMES J. JOHNSTON.

Subscribed and sworn to before me this 14th day of March, 1920.

JOSEPH A. O'BRIEN,
Notary Public, Kings County.

Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
Kings Co. Register's No. 2085.
New York Co. Clerk's No. 92.
New York Co. Register's No. 2048.
Term expires March 30, 1922.

102 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

On the 14th day of March, in the year 1921, before me personally came James J. Johnston, to me known, and being by me duly sworn, did depose and say that he resides in New York City; that he is the

matchmaker & general manager of Central Manhattan Boxing Club, the corporation described in and who executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

JOSEPH A. O'BRIEN,
Notary Public, Kings County.

Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
King's Co. Register's No. 2085.
New York Co. Clerk's No. 92.
New York Co. Register's No. 2048.
Term expires March 30, 1922.

To be filed and made a part of this report.
Copy of report to State treasurer.
Referee's reports:
Referees.
Physicians.
Judge's cards.
Weights.
(The boxing commission furnishes blanks for all the above and these reports must be filed with the corporation report.)

103 GOVERNMENT EXHIBIT 9

11/4/21

New York State Boxing Commission

Received Mar. 28, 1921.

Referred to _____, per Sec'ty.

New York State Boxing Commission Corporation report after contest

This report must reach the boxing commission not later than 72 hours after the contest herein described. This report must be typewritten.

Report of Central Manhattan Boxing Club, corporation of Exhibition held at West 155th Street and Eighth Ave., N. Y. City, on March 24th, 1921

The following are the names of all boxers taking part, duration of bouts, decisions, payments made to boxers:

Boxers	License No.	Rounds	Decisions	Payments to boxers
Pete Herman	344	1	Won	$1,100.00
George Adams	3055	1	Lost	750.00
Jack Stone	1202	10	Lost	750
Augie Ratner	73	10	Won	702.45
Willie Morris	2141	6	Draw	50
Artie Pierce	2778	6	Draw	50
Peter Slane	931	6	Won	50
Joe Dundee	1948	6	Lost	50

104 Judges	License No.	Referees	License No.	Chief Seconds	License No.
Martin McCue		John Donnelly		Lew Brown	899
Mr. Connelly		Artie McGovern		Charlie Rose	796
				Doc Bagley	479
				Julius Hirsh	3226
				Morris Ladisky	1905
				Tony Bolozolo	1714
				Ben Smith	1640
				Harry Maxwell	1698

Gross receipts $5,680.00
Net receipts $3,867.45
State tax ..... $ 284.00
Federal tax ..... $ 568.00
Complimentary tickets, 227—5.00; 158—3.30, including press tickets.

JOSEPH M. O'BRIEN, asst. treas. of the above corporation appearing before me this 26th day of March, 1921, deposes and says that the above statements are true to the best of his knowledge and belief.

JOSEPH M. O'BRIEN.

Subscribed and sworn to before me this 26th day of March, 1921.

JOSEPH A. O'BRIEN,
Notary Public, Kings County.

Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
Kings Co. Register's No. 2085.
New York Co. Clerk's No. 92.
New York Co. Register's No. 2048.
Term expires March 30, 1922.

105 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

On the 26th day of March, in the year 1921, before me personally came Joseph M. O'Brien, to me known, and being by me duly sworn, did depose and say that he resides in Borough of Manhattan, N. Y.; that he is the asst. secretary of Central Manhattan Boxing Club the corporation described in and who executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by

order of the board of directors of said corporation, and that he signed his name thereto by like order.

JOSEPH A. O'BRIEN
Notary Public, Kings County.
Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
Kings Co. Register's No. 2085.
New York Co. Clerk's No. 92.
New York Co. Register's No. 2048.
Term expires March 30, 1922.

To be filed and made a part of this report.
Copy of report to State treasurer.
Referee's reports:

Referees.
Physicians.
Judges' cards.
Weights.

(The boxing commission furnishes blanks for all the above and these reports must be filed with the corporation report.)

106 GOVERNMENT EXHIBIT 10.

11/4/21

New York State Boxing Commission

Received Mar. 28, 1921.
Referred to_____ per Sec'ty

To the STATE TREASURER, *Albany, N. Y.:*

The undersigned, complying with the provisions of Section 25 of Chapter 912 of the Laws of 1920, makes the following report:

I. Name of club: Central Manhattan Boxing Club.
II. Address: 155th Street and Eight Ave., N. Y. City
III. Date of contest: March 24th 1921.
IV. Names of contestants: Kid Herman, George Adams, Jack Stone, Augie Ratner, Willie Morris, Artie Pierce, Joe Dundee, Pete Slaine.
V. Number of tickets sold and gross proceeds thereof:

No. 1 to No. 304	General admissions at	$5.00	$1,520.
No. 1 to No. 37	Reserved seats at	$5.00	$ 184.
No. 1 to No. 49	Reserved seats at	$3.30	$ 147.
No. 1 to No. 298	Reserved seats at	$3.30	$ 894.
No. 1 to No. 102	Reserved seats at	$2.20	$ 204.
No. 1 to No. 413	Reserved seats at	$2.00	$ 826.
No. 1 to No. 240	Reserved seats at	$1.10	$ 240.
10	Tickets exchanged at	$3.30	$ 30.
5	Tickets exchanged at	$5.00	$ 25.
	Complimentary tickets		$1,609.
	Total		$5,680.00
			5%
			$ 284.00

Number of press tickets issued, 300.
Number of complimentary tickets issued, 85.

107 VI. No contest other than the foregoing has been held by the undersigned since rendering its last report.

VII. No person without a ticket was admitted to the contest on the above mentioned date, and the foregoing is a true and correct statement of the total number of tickets issued, sold and exchanged in connection with said contest, and of the amount of the gross receipts of all tickets sold for said contest, and any other revenue.

Dated 25th ----------, 1921.

By JOSEPH M. O'BRIEN,
Asst. Secretary Treasurer.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

JOSEPH M. O'BRIEN, being duly sworn says that he is the ass't secretary of the above named corporation
association and as such is authorized to make this club
report; that he has read the foregoing report, knows the contents thereof, and that the same is true to his knowledge.

Sworn to before me this 26th day of March, 1921.

JOSEPH A. O'BRIEN,
Notary Public, Kings County.

Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
Kings Co. Register's No. 2085.
New York Co. Clerk's No. 92.
New York Co. Register's No. 2048.
Term expires March 30, 1922.

108 GOVERNMENT EXHIBIT 11

11/4/21

New York State Boxing Commission

Received Apr. 5, 1921.
Referred to ---------- per Sec'ty.

New York State Boxing Commission Corporation report after contest

This report must reach the boxing commission not later than 72 hours after the contest herein described. This report must be typewritten.

Report of Central Manhattan Boxing Club, corporation of exhibition held at 155th Street & 8th Avenue, New York on March 31st, 1921.

The following are the names of all boxers taking part, duration of bouts, decisions, payments made to boxers:

Boxers	License No.	Rounds	Decisions	Payments to boxers
Johnny Buff		2	Yes	$3,000.00
Abe Goldstein		2		3,000.00
Mike McCabe		10	Draw	500.00
Jimmy Powers		10	do	250.00
Kid Carter		2		50.00
K. O. Kaplin		2	Yes	50.00
Artie Pierce		6	Yes	50.00
Terry Davis		6		50.00
				6,950.00

109 Judges	Licnese No.	Referees	License No.	Chief seconds	License No.
Thomas Shortell		Thomas Smith	586	J. Hirsch	3236
George Schwager		Patsy Haley	591	B. Seeman	799
				P. Bracken	1532
				J. Gould	1422
				R. Lippman	786
				J. Gould	1422
				J. Hannen	2660
				F. Maxwell	1698

Gross receipts	$12,829.30
Net receipts	$11,454.00
State tax	$ 687.65
Federal tax	$ 1,375.30

Complimentary tickets 80 @ $5.50.
Working press tickets, 202 @ $7.70; 97 @ $5.50.

JOSEPH M. O'BRIEN, of the above corporation, appearing before me this 2nd day of April, 1921, deposes and says that the above statements are true to the best of his knowledge and belief.

JOSEPH M. O'BRIEN.

Subscribed and sworn to before me this 2nd day of April, 1921.

JOSEPH A. O'BRIEN,
Notary Public, Kings County,
Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
Kings Co. Register's No. 2085.
New York Co. Register's No. 2048.
New York Co. Clerk's No. 92.
Term expires March 30, 1922.

110 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

On the 2nd day of April, in the year 1921, before me personally came Joseph M. O'Brien, to me known, and being by me duly sworn, did depose and say that he resides in Borough of Manhattan; that he is the ass. secretary of Central Manhattan Boxing Club, the corporation described in and who executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of

the board of directors of said corporation, and that he signed his name thereto by like order.

JOSEPH A. O'BRIEN,
Notary Public, Kings County.

Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
Kings Co. Register's No. 2085.
New York Co. Clerk's No. 92.
New York Co. Register's No. 2048.
Term expires March 30, 1922.

To be filed and made a part of this report.
Copy of report to State Treasurer.
Referee's reports:
Referees.
Physicians.
Judges' cards.
Weights.
(The boxing commission furnishes blanks for all the above and these reports must be filed with the corporation report.)

111 GOVERNMENT EXHIBIT 12 FOR IDENTIFICATION

11/4/21

New York State Boxing Commission

Received Apr. 5, 1921.
Referred to ---------- per Sec'ty.

To the STATE TREASURER, *Albany, N. Y.:*

The undersigned, complying with the provisions of section 25 of chapter 912 of the Laws of 1920, makes the following report:

I. Name of club: Central Manhattan Boxing Club.
II. Address: 155th Street & 8th Avenue, New York City, N. Y.
III. Date of contest: March 31st, 1921.
IV. Names of contestants:
Johnny Buff, vs. Abe Goldstein.
Mike McCabe, " Jimmy Powers.
Kid Carter, " K. O. Kaplin.
Artie Pierce, " Terry Davis.

V. Number of tickets sold and gross proceeds thereof:

112	217 No. 1 to No. 217	General admissions at	$1.00	$	217.00
	125 No. 1 to No. 125	Reserved seats at	$3.00	$	375.00
	457 No. 1 to No. 457	Reserved seats at	$3.00	$	1,371.00
	91 No. 1 to No. 91	Reserved seats at	$5.00	$	455.00
	850 No. 1 to No. 850	Reserved seats at	$5.00	$	4,250.00
	10 No. 1 to No. 10	Reserved seats at	$7.00	$	70.00
	66 No. 1 to No. 66	Reserved seats at	$7.00	$	462.00
	593 No. 1 to No. 593	Reserved seats at	$7.00	$	4,151.00
	45—$3.00	Tickets exchanged at	$5.00	$	99.00
		Cash in box		$	4.00
		Complimentary gross		$	2,299.00
		Total		$13,733.00	
		5%			
				$	687.65

Number of press tickets issued, 202 *@* $7.70; 97 *@* $5.50.
Number of complimentary tickets issued, 80 *@* $5.50.

VI. No contest other than the foregoing has been held by the undersigned since rendering its last report.

VII. No person without a ticket was admitted to the contest on the above mentioned date, and the foregoing is a true and correct statement of the total number of tickets issued, sold and exchanged in connection with said contest, and of the amount of the gross receipts of all tickets sold for said contest, and any other revenue.
Dated April 2nd, 1921.

By JOSEPH M O'BRIEN,
Asst. Treasurer.

113 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

JOSEPH M. O'BRIEN, being duly sworn says that he is the assistant secretary of the above named corporation
association and as such is authorized to make this
club
report; that he has read the foregoing report, knows the contents thereof, and that the same is true to his knowledge.

JOSEPH M. O'BRIEN.

Sworn to before me this 2nd day of April, 1921.

JOSEPH A. O'BRIEN,
Notary Public, Kings County.

Residing in Borough of Brooklyn.
Kings Co. Clerk's No. 44.
Kings Co. Register's No. 2085.
New York Co. Clerk's No. 92.
New York Co. Register's No. 2048.
Term expires March 30, 1922.

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GOVERNMENT EXHIBIT 13

11/4/21

New York State Boxing Commission

Received April 11, 1921.
Referred to----------, per Sec'ty.

New York State Boxing Commission corporation report after contest

This report must reach the boxing commission not later than 72 hours after the contest herein described. This report must be typewritten.

Report of Central Manhattan Boxing Club, corporation, of exhibition held at Manhattan Casino, 155th Street, New York City, N. Y., on April 7th, 1921

The following are the names of all boxers taking part, duration of bouts, decisions, payments made to boxers:

Boxers	License No.	Rounds	Decisions	Payments to boxers
Jack Sharkey		15	No	$3,617.79
Midget Smith	1032	15	Yes	3,014.82
Jimmie Duffy	3530	10	No	450.00
Mickey Donley	1002	10	Yes	650.00
Jack Redmond	1598	6	Draw	50.00
Barney McGovern	160	6	Draw	50.00
Charlie Meaney	931	6	No	50.00
Pete Slaine	3347	6	Yes	50.00
				7,932.61

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Judges	License No.	Referees	License No.	Chief seconds	License No.
Jim Fury		Tommy Smith		L. Solow	3204
James Devitt		Johnny Burdick		Harry Neary	826
				A. Amodeo	836
				L. Solow	3204
				J. Johnson	2105
				W. Freeman	2763
				H. Maxwell	1698
				H. Neary	826

Gross receipts	$16,424.10
Net receipts	$12,684.00
State tax	$746.55
Federal tax	$1,493.10

Complimentary tickets, 80 @ $5.50.
Working press tickets, 128 @ $5.50; 171 @ $7.70.

JOSEPH M. O'BRIEN, of the above corporation appearing before me this 11th day of April, 1921, deposes and says that the above statements are true to the best of his knowledge and belief.

JOSEPH M. O'BRIEN.

Subscribed and sworn to before me this 11th day of April, 1921.

116 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

On the 11th day of April, in the year 1921, before me personally came Joseph M. O'Brien, to me known, and being by me duly sworn, did depose and say that he resides in city of New York; that he is the asst. treasurer of the Central Manhattan Boxing Club—the corporation described in and who executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

J. NEWTON OSORIO,
Commr. of Deeds, N. Y. City.

N. Y. Co. Clerk # 15.
Expires March 1, 1921.

To be filed and made a part of this report.
Copy of report to State treasurer.
Referee's reports:
Referees.
Physicians.
Judges' cards.
Weights.
(The boxing commission furnishes blanks for all the above and these reports must be filed with the corporation report.)

117 GOVERNMENT EXHIBIT 14 FOR IDENTIFICATION

11/4/21

New York State Boxing Commission

Received Apr. 11, 1921

Referred to..... per Sec'ty.

To the STATE TREASURER, *Albany, N. Y.:*

The undersigned, complying with the provisions of section 25 of chapter 912 of the Laws of 1920, makes the following report:
I. Name of club: Central Manhattan Boxing Club.
II. Address: West 155th Street, N. Y. City.
III. Date of contest: April 7th 1921.

IV. Names of contestants: Jack Sharkey, Midget Smith, Barney McGovern, Jack Redmond, Mickey Donnelly, Jimmie Duffy, Pete Slane, Charles Meaney.

V. Number of tickets sold and gross proceeds thereof:

No. 1 to No. 216	General admissions at	$1.00	$ 216.
No. 1 to No. 606	Reserved seats at	$3.00	$ 1,818.
No. 1 to No. 831	Reserved seats at	$5.00	$ 4,155.
No. 1 to No. 923	Reserved seats at	$7.00	$ 6,461.
3—3.00	Tickets exchanged at	$7.00	$ 12.
16—5.00	Tickets exchanged at	$7.00	$ 32.
	Complimentary gross		$ 2,237.
	Total		$14,931.
			5%
			746.55

Number of press tickets issued, 128, 5.00; 171, 7.70.
Number of complimentary tickets issued, 80, 5.50.

118 I. No contest other than the foregoing has been held by the undersigned since rendering its last report.

VII. No person without a ticket was admitted to the contest on the above mentioned date, and the foregoing is a true and correct statement of the total number of tickets issued, sold and exchanged in connection with said contest, and of the amount of the gross receipts of all tickets sold for said contest, and any other revenue.

Dated....., 192..

By JOSEPH M. O'BRIEN
Asst Treasurer.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

JOSEPH M. O'BRIEN, being duly sworn says that he is the asst treasurer of the above named corporation
association and as such is authorized to make this club
report; that he has read the foregoing report, knows the contents thereof, and that the same is true to his knowledge.

Sworn to before me this 11th day of April, 1921.

J NEWTON OSORIO,
Commissioner of Deeds, N. Y. City.

N. Y. Co. Clerk #15
Expires March 1, 1923.

119 GOVERNMENT EXHIBIT 15

11/4/21

New York State Boxing Commission

Corporation report after contest

This report must reach the boxing commission not later than 72 hours after the contest herein described. This report must be typewritten.

V. Number of tickets sold and gross proceeds thereof:

123	230 No. 1 to No. 230	General admissions at	$1.00	$	230.00
	443 No. 1 to No. 443	Reserved seats at	$2.00	$	886.00
163	No. 1 to No. 163	Reserved seats at	$2.00	$	326.00
257	No. 1 to No. 257	Reserved seats at	$3.00	$	771.00
59	No. 1 to No. 59	Reserved seats at	$3.00	$	177.00
227	No. 1 to No. 227	Reserved seats at	$5.00	$1,	135.00
		Tickets exchanged at		$	38.00
				$3,	563.00
		Complimentary gross		$1,	340.00
		Total		$4,	903.00
					5%
				$	245.15

Number of press tickets issued, 205 @ $5.00; 30 @ $3.00.
Number of complimentary tickets issued, 75 @ $3.00.

VI. No contest other than the foregoing has been held by the undersigned since rendering its last report.

VII. No person without a ticket was admitted to the contest on the above-mentioned date, and the foregoing is a true and correct statement of the total number of tickets issued, sold, and exchanged in connection with said contest, and of the amount of the gross receipts of all tickets sold for said contest, and any other revenue.

Dated May 6th, 1921.

By JOSEPH M. O'BRIEN,
Asst. Treasurer.

124 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

JOSEPH M. O'BRIEN, being duly sworn, says that he is the asst. treasurer of the above-named corporation and as such is authorized to make this report; that he has read the foregoing report, knows the contents thereof, and that the same is true to his knowledge.

Sworn to before me this 6th day of May, 1921.

FRANK H. RICE,
Notary Public.
New York County, No. 80.
New York Register No. 2126.
Term expires March 30, 1922.

GOVERNMENT EXHIBIT 17

11/4/21

New York State Boxing Commission

Received May 28, 1921.
Referred to_____per Sec'ty.

New York State Boxing Commission Corporation report after contest

This report must reach the boxing commission not later than 72 hours after the contest herein described. This report must be typewritten.

125 Report of Central Manhattan Boxing Club corporation of exhibition held at Manhattan Casino, 155th St. & 8th Ave., N. Y. C., New York, on May 19th, 1921.

The following are the names of all boxers taking part, duration of bouts, decisions, payments made to boxers:

Boxers	License No.	Rounds	Decisions	Payments to boxers
Bob Martin	2273	10	Yes	$403.80
Joe Cox	2672	10	No	1,000.00
Earl Puryear	329	10	Yes	400.00
Bud Dempsey	47	10	No	250.00
Kid Carter	2713	6	No	50.00
Babe Smith	2284	6	Yes	50.00
Willie Gilligan	1316	6	No	50.00
Willie Burns	2188	6	Yes	50.00
				2,253.80

Judges	License No.	Referees	License No.	Chief seconds	License No.
Mr. Donnelly		Mr. Haley		Jimmy Bronson	2338
Mr. Schwegler		Mr. Haukup		H. Cohn	3779
				Mr. Smith	1640
				Mr. Hersh	3218
				Mr. Kuster	3618
				Mr. Lyons	486
				Mr. Gaboury	1122
				W. Boyle	1632

Gross receipts	$2,818.20
Net receipts	2,562.00
State tax	128.10
Federal tax	256.20

Complimentary tickets, 72, $3.00.
Working press tickets, 200, 5.00.

126 JOSEPH M. O'BRIEN of the above corporation appearing before me this 20th day of May, 1921, deposes and says that the above statements are true to the best of his knowledge and belief.

JOSEPH M. O'BRIEN.

Subscribed and sworn to before me this 20 day of May, 1921.

STATE OF NEW YORK,
COUNTY OF N. Y., *ss:*

On the 20 day of May, in the year 1921, before me personally came Joseph M. O'Brien, to me known, and being by me duly sworn, did depose and say that he resides in New York City; that he is the asst. treasurer of Central Manhattan Boxing Club, the corporation described in and who executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of

directors of said corporation, and that he signed his name thereto by like order.

CORNELIUS J. CREGAN,
Notary Public.

New York County No. 190.
New York Register No. 2161.
Com. exp. March 30, 1922.

To be filed and made a part of this report.
Copy of report to State treasurer.
Referee's reports:
Referees.
Physicians.
Judges' cards.
Weights.

127 (The boxing commission furnishes blanks for all the above and these reports must be filed with the corporation report.)

GOVERNMENT EXHIBIT 18 FOR IDENTIFICATION

(Copy for boxing commission)
11/4/21

New York State Boxing Commission

Received May 23, 1921.
Referred to ---------- per Sec'ty.

To the STATE TREASURER, *Albany, N. Y.:*

The undersigned, complying with the provisions of section 25 of chapter 912 of the Laws of 1920, makes the following report:

I. Name of club: Central Manhattan Boxing Club.

II. Address: Manhattan Casino, 155th St., & 8th Ave., New York City, N. Y.

III. Date of contest: May 19th 1921.

IV. Names of contestants:

Bob Martin, vs. Joe Cox.
Earl Puryear, " Bud Dempsey.
Kid Carter, " Babe Smith.
Willie Gilligan, " Willie Burns.

128 V. Number of tickets sold and gross proceeds thereof:

202	No. 1 to No. 202	General admissions at	$1.00	$	202.00
111	No. 1 to No. 111	Reserved seats at	$2.00	$	222.00
25	No. 1 to No. 25	Reserved seats at	$3.00	$	75.00
101	No. 1 to No. 101	Reserved seats at	$3.00	$	303.00
9	No. 1 to No. 9	Reserved seats at	$5.00	$	45.00
94	No. 1 to No. 94	Reserved seats at	$5.00	$	470.00
13	—$3.00	Tickets exchanged at	$5.00	$	26.00
3	— 1.00	Tickets exchanged at	$2.00	$	3.00
					$1,346.00
		Complimentary gross			$1,216.00
		Total			$2,562.00
					5%
				$	128.10

Number of press tickets issued, 200, $5.00.
Number of complimentary tickets issued, 72, $3.00.

VI. No contest other than the foregoing has been held by the undersigned since rendering its last report.

VII. No person without a ticket was admitted to the contest on the above-mentioned date, and the foregoing is a true and correct statement of the total number of tickets issued, sold, and exchanged in connection with said contest, and of the amount of the gross receipts of all tickets sold for said contest, and any other revenue.

Dated May 20, 1921.

By JOSEPH M. O'BRIEN,
Asst. Treasurer.

129 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

JOSEPH M. O'BRIEN, being duly sworn says that he is the asst. treasurer of the above named corporation and as such is authorized to make this report; that he has read the foregoing report, knows the contents thereof, and that the same is true to his knowledge.

Sworn to before me this 20 day of May 1921.

CORNELIUS J. CREGAN,
Notary Public, N. Y. County, City of N. Y.

New York County No. 190.
New York Register No. 2161.
Com. exp. March 30/1922.

130 DEFENDANT'S EXHIBIT A

11/4/21

JULY 14TH, 1921.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Customs House, New York City.

In re: Central Manhattan Boxing Club—774.

GENTLEMEN: Your communication, dated July 12th, asking for the payment of November, 1920 tax of $150.78 has been referred to me.

Will you kindly notify me at once as to any and all amounts that are due for unpaid taxes on sales from November 28th, 1920 to May 20th, 1921.

The taxes were collected and paid to the assistant treasurer and the matchmaker of the Club and the moneys if not paid are still held by them.

Kindly advise me as to what amount is due and the dates for which the sales tax has not been paid.

Yours very truly,

F. C. HAYDEN.

131 DEFENDANT'S EXHIBIT B

Copy

No.....
Class.....

New York State Athletic Commission License Committee

Chapter 714, Laws of 1921

Application for license to hold boxing, sparring, or wrestling matches

Fees:

Cities first class, $750.00.
Cities, 2d class, $500.00.
Elsewhere, $300.00.

Certified cheque, cash, or money order covering license fee must accompany all applications. Cheques and money orders to be made payable to license committee, New York State Athletic Commission.

[All answers must be typewritten.]

Date Nov. 20TH 1920.

To the License Committee, New York State Athletic Commission:

The undersigned having submitted the necessary bond and paid the required fee, hereby makes application to conduct boxing or wrestling exhibitions in accordance with chapter 714 of the Laws of 1921 and any amendments thereto, and subject always to
132 the rules and regulations of the New York State Athletic Commission. It is agreed that this license may be suspended or revoked at will by the license committee, and that it is not transferable.

CENTRAL MANHATTAN BOXING, INC.,
By GEORGE ESSELBORN, *President.*

Name of corporation: Central Manhattan Boxing Club, Inc.
Address: 2926 8th Ave., Boro. Man., city of N. Y.
Premises where contest will be held: Manhattan Casino, 155 Street & 8th Ave., N. Y. City.
If premises are owned by corporation, so state: Leased.
Officers of corporation:

President: George Esselborn. Address: 415 West *West* 50th Street, N. Y. City.
Vice-President: John Campbell. Address: 414 St. Nicholas Ave., N. Y. City.
Secretary: Elbert O. Smith. Address: 1 West 69th Street, N. Y. City.
Treasurer: Abraham Bach. Address: 566 West 160th Street, N. Y. City.

Character of corporation:
Membership club: Membership club.
Stock corporation: Stock corporation.
Date of incorporation: Nov. 20, 1920.
Date of filing certificate: Nov. 25th, 1920.
Where filed: New York County, county clerks office.
Name of matchmaker: James J. Johnston.
Name of director of bouts: John J. Powers.
Record of matchmaker: Last fifteen years has conducted athletic enterprises in N. Y. City and elsewhere. Managed six-day races
1914, 1915, 1918; managed Military Athletic League Car-
133 nival, Madison Square Garden, 1915. During World War conducted various boxing exhibitions for patriotic purposes. Managed auto races at Sheepshead Bay; 1919. Conducted a number of contests at the St. Nicholas Rink, N. Y. City, 1913–1917; also managed boxers.

Record of director of bouts: For past ten years has been engaged in promoting athletic enterprises, i. e., automobile races and boxing clubs and has managed boxers.

Record of club officials other than two above-mentioned if connected with promotion of boxing or wrestling contests heretofore, either as managers, promoters, boxers, wrestlers, or in any other capacity: No other official has ever been connected with boxers and boxing in any capacity.

Premises:

Seating capacity: About five thousand.

Is there any pending violation of the Building Department, Health Department or the Bureau of Fire Prevention? No.

Does any person other than a janitor or caretaker reside upon the premises? No.

Are religious services held in these premises? No.

Is any manager or boxer or other participant in boxing or wrestling interested either as a stockholder, bondholder or mortgagee in your corporation? No.

Is any manager, boxer or wrestler employed by your corporation, in any capacity? No.

If so, state circumstances fully----------

Has the corporation or its stockholders or officers any financial interest in any boxers or wrestlers? No.

References for club. (Give five.)

134

Name	Address
Ernest V. Finch	25 Pine Street, N. Y. City.
Oscar Foley	149 Broadway, N. Y. City.
James J. Haben	172 West 82nd Street, N. Y. City.
Charles W. Culkin	48 Jane St., N. Y. City.
James Garritty	57 Centre St., N. Y. City.

[SEAL] CENTRAL MANHATTAN BOXING CLUB, INC.,
By GEORGE ESSELBORN (signed), *President.*

GEORGE ESSELBORN, president of the above corporation, appearing before me this 23rd day of November, 1920, deposes and says that the above statements are true to the best of his knowledge and belief.

GEORGE ESSELBORN. (Signed.)

GEORGE W. HAYDEN. (Signed.)

Subscribed and sworn to before me this 1st day of October, 1920.

135 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

On the 23rd day of November in the year 1920, before me personally came George Esselborn, to me known, and being by me duly sworn, did depose and say that he resides in New York City; that he is the president of Central Man. Boxing Club, Inc., the corporation described in and who executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

GEORGE W. HAYDEN,
Notary Public, New York County Co. 240, Reg. 2189.

Approved November 26th, 1920.

NEW YORK STATE ATHLETIC COMMISSION
LICENSE COMMITTEE,
----------, *Chairman.*

136 DEFENDANT'S EXHIBIT C.

11/4/21

Duplicate original

This indenture, made the first day of October, nineteen hundred and twenty, between Manhattan Casino, Inc., a New York corporation, having its principal office at 290 W. 155th St., New York City, party *of the party* of the first part, and Manhattan Athletic Club of America, Inc., a domestic membership corporation, having its principal place of business at 2926 Eighth Avenue, Borough of Manhattan, City of New York, party of the second part,

Witnesseth, That the said party of the first part hath letten, and by these presents doth grant, demise, and to farm let, unto the said party of the second part, the premises known as the ball room of the Manhattan Casino, situate on the south side of 155th Street, distant one hundred and fifty (150) feet east of Eighth Avenue, being two hundred (200) feet in length on 155th Street by one hundred (100) feet in depth on each side, more or less, with the appurtenances, for the term of fifteen (15) months from the first day of October, nineteen hundred and twenty, at the yearly rent or sum of twenty-four thousand to be paid in equal monthly payments in advance on the first day of each and every month during said term.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and the same to have again, repossess and enjoy.

137 And the said party of the second part does covenant to pay to the said party of the first part the said yearly rent as herein specified.

And also, to pay all taxes and assessments and the regular annual rent or charge, which is or may be assessed or imposed according to law, upon the said premises, for the water, on or before the 1st day of June in each year, during the term, and if not so paid, the same shall be added to the rent then due. And the said party of the second part further covenants that it will not assign this lease, nor let or underlet the whole or any part of the said premises, nor make any alteration therein without the written consent of the said party of the first part, under the penalty of forfeiture and damages; and that it will not occupy or use the said premises, nor permit the same to be occupied or used for any business deemed extra hazardous on account of fire or otherwise, without the like consent under the like penalty. And the said party of the second part, further covenant that it will permit the said party of the first part, or its agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of next preceding the expiration of the term, will permit the usual notices "to let" or "for sale" to be placed upon the walls or doors of said premises, and remain thereon without hindrance or molestation. And it is further agreed between the parties to these presents, that in case the building or buildings erected on these premises hereby leased shall be partially damaged by fire, the same shall be repaired as speedily as possible at the expense of the said party of the first part; that in case the damages shall

138 be so extensive as to render the building untenantable, the rent shall cease until such time as the building shall be put in complete repair, but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thence forth this lease shall cease and come to an end, provided, however, that such damage and destruction be not caused by the carelessness, negligence or improper conduct of the party of the second part, its agents or servants. And the said party of the second part further covenants and agrees that it will comply with all the requirements of the board of health, municipal authorities and police and fire departments of the city of New York.

And at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And the said party of the first part does covenant that the said party of the second part, on paying the said yearly rent, and per-

forming the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed, that the covenants and agreements contained in the within lease are binding on the parties hereto and their legal representatives.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

139 Sealed and delivered in the presence of—

FRANK CASE HAYDEN.

MANHATTAN CASINO CO., INC.,
By EDWARD S. WALDRON. (L. S.)
MANHATTAN ATHLETIC CLUB OF AMERICA,
By GEORGE ESSELBORN, *President.* (L. S.)

Attest:
[SEAL] E. O. SMITH, *Secretary.*

Duplicate original

Manhattan Casino, Inc., to
Manhattan Athletic Club of America, Inc.

Lease

Dated October 1st, 1920.
Term, fifteen months.
Terminates January 1st, 1922.
Annual rent, $24,000.

140 STATE OF NEW YORK,
CITY OF NEW YORK, COUNTY OF NEW YORK, *ss:*

On the 1st day of October, in the year one thousand nine hundred and twenty, before me personally came Edward S. Waldron, to me known and who, being by me duly sworn, did depose and say that he resides in the Borough of Manhattan, City of New York; that he is the president of the Manhattan Casino, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

GEORGE W. HAYDEN,
Notary Public, New York County, Co. 240, Reg. 2189.

Know that we, the Manhattan Athletic Club of America, Inc., a domestic membership corporation with offices at 2926 Eighth Avenue, New York City, assignor, in consideration of one dollar and other valuable consideration in dollars, paid by Central Manhattan Boxing Club, Inc., a New York stock corporation with its principal

office at 2926 Eighth Avenue, New York City, assignee, hereby assigns unto the assignee, a certain lease made by the Manhattan
141 Casino, Inc., of New York City, N. Y., to the aforesaid Manhattan Athletic Club of America, Inc., for a term of fifteen (15) months of the building known as the Manhattan Casino, about one hundred feet east of 8th Avenue on the south side of 155th Street, in the Borough of Manhattan, New York City, dated the 1st day of October, 1920. A duplicate orginal of said lease was filed with the State boxing commission November 17, 1920.

Together with the premises therein described, and the buildings thereon, with the appurtenances.

To have and to hold the same unto the assignee, its successors and assigns, from the 23rd day of November, nineteen hundred and twenty for all the rest of said term.
years mentioned in the said lease, subject to the rents, covenants, conditions and provisos therein also mentioned.

And the assignor hereby covenants that the said assigned premises are free from incumbrances.

In witness whereof, the assignor has hereunto set its hand and seal the 23rd day of November, 1920.

In presence of—

FRANK C. HAYDEN.

[SEAL.] MANHATTAN ATHLETIC CLUB OF AMERICA, INC.,
GEORGE ESSELBORN, *President.*

[SEAL.] CENTRAL MANHATTAN BOXING CLUB, INC.,
GEORGE ESSELBORN, *President.*

142 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

On the 23rd day of November, nineteen hundred and twenty before me came George Esselborn, to me known, who, being by me duly sworn, did depose and say that—he resides in the city of New York, at 415 West 50th Street, that he is the president of the Manhattan Athletic Club of America, Inc., the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation, that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

GEORGE W. HAYDEN,
Notary Public, New York County, Co. 240, Reg. 2189.

143 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

On the 23rd day of November, nineteen hundred and twenty, before me came George Esselborn to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York, at 415 West 50th Street, that he is the president of the Cen-

tral Manhattan Boxing Club, Inc., the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

GEORGE W. HAYDEN,
Notary Public, New York County, Co. 240, Reg. 2189.

Manhattan Athletic Club of America, Inc., to Central Manhattan Boxing Club, Inc.

Assignment of Lease

Dated Nov. 23, 1920.
The within assignment is hereby consented to.
Nov. 23, 1920.

MANHATTAN CASINO, INC.,
By EDWARD S. WALDRON,
President.

144 DEFENDANT'S EXHIBIT D

Duplicate Original

11/4/21

Certificate of Incorporation of Central Manhattan Boxing Club, Inc.

We, the undersigned, all being natural persons of full age, and at least two-thirds being citizens of the United States, and all being residents of the State of New York, desiring to form a stock corporation pursuant to the provisions of the business corporations law of the State of New York, do hereby make, sign, acknowledge and file this certificate in duplicate for that purpose as follows:

First: The name of the proposed corporation is: Central Manhattan Boxing Club, Inc.

Second: The purposes for which it is to be formed are:

(a) To provide and maintain a clubhouse or meeting house or meeting place for its members.

(b) To provide and maintain a suitable gymnasium or gymnasiums and such other places of recreation as are usually provided for by athletic clubs or associations for the use of its members.

(c) To foster and encourage athletic sports and contests.

(d) From time to time to hold or give boxing or sparring matches or exhibitions for prizes or purses for entrance to which an entry fee is to be received, subject to and in conformity with the law.

145 (e) To buy, sell, mortgage or lease real property. To do all and everything necessary, suitable or convenient or proper for the accomplishment of any of the purposes or the attainment of any of the objects herein enumerated and incidental to the powers herein named or which at any time appears conducive or expedient for the protection and benefit of the company.

Third: The amount of the capital stock of the proposed corporation is to be $1,000.

Fourth: The number of shares of which the capital stock shall consist of is 100 of the par value of $10.00 per share, and the amount of capital with which said corporation shall begin business is $500.00.

Fifth: Its principal business office will be in the Borough of Manhattan, City of New York, and its temporary office is at No. 2926 8th Avenue, Borough of Manhattan, city of New York.

Sixth: Its duration is to be perpetual.

Seventh: The number of its directors is to be three who need not be stockholders.

Eighth: The names and addresses of the directors are:

146

Names.	Post office addresses.
George Esselborn	415 West 50th Street, Borough of Manhattan, New York City.
Frank E. Smith	974 St. Nicholas Ave., Borough of Manhattan, New York City.
Daniel J. Kinsley	515 West 168th Street, Borough of Manhattan, New York City.

Ninth: The names and post office addresses of the subscribers of the certificate, together with a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post office addresses.	Number of shares.
George Esselborn	415 West 50th Street, Borough of Manhattan, city of New York.	10
Abraham L. Bach	290 West 155th Street, Borough of Manhattan, city of New York.	10
Edward Waldron	695 St. Nicholas Avenue, Borough of Manhattan, city of New York.	10

Tenth: The meetings of the Board of Directors may be held only within the State of New York.

147 In witness whereof, we have made, signed, acknowledged, and executed this certificate, in duplicate, this 20th day of November, 1920.

GEORGE ESSELBORN,
ABRAHAM L. BACH,
EDWARD WALDRON.

Duplicate original

Certificate of incorporation of Central Manhattan Boxing Club, Inc.

Certificate of incorporation

Frank C. Hayden, attorney &c., 156 Broadway, N. Y. C.
Filed with Secretary of State Nov. 23, 1920. Recorded Nov. 25, 1920; on receipt of balance of fees.

148 STATE OF NEW YORK,
CITY OF NEW YORK, COUNTY OF NEW YORK, *ss:*

On this 20th day of November, 1920, before me personally came George Esselborn, Abraham Bach, and Edward Waldron, all to me known and known to me to be the individuals described in and who executed the foregoing instrument and they severally duly acknowledged to me that they executed the same.

GEORGE HAYDEN,
Notary Public, New York County, Co. 240, Reg. 2189.

149 *Stipulation re bill of exceptions*

[Title omitted.]

It is hereby stipulated by and between William Hayward for the Government, and Arthur N. Sager for the appellant, James J. Johnston, that the foregoing contains a true verbatim copy of all the testimony contained in the original record for and against James J. Johnston, according to the stenographer's minutes of same.

It is further stipulated that the foregoing shall be accepted as and for the bill of exceptions upon the appeal in this case, and that an order settling said bill of exceptions and ordering the same to be filed with the clerk of the District Court for the Southern District of New York may be entered by the judge who presided at the trial, although at the time of signing and settling the bill of exceptions said presiding judge may be without the Southern District of New York and that the bill of exceptions so signed and settled upon this stipulation shall be valid and binding as though the same had been signed and settled by a judge within the district in accordance with the practice obtaining in this district.

150 It is further stipulated that all exhibits not printed in full in the record herein may be used upon the argument of the appeal and handed to the court with the same force and effect as if they had been set forth at length in the record, but that all exhibits required to be printed by the Government shall be printed.

Dated June 20, 1922.

WILLIAM HAYWARD,
U. S. Attorney.
ARTHUR N. SAGER,
Attorney for Defendant.

151 In United States District Court

[Title omitted.]

Order settling bill of exceptions

Upon reading the stipulation signed by William Hayward for the Government, and Arthur N. Sager for the appellant, that the foregoing is accepted and shall serve as and for a bill of exceptions in the above entitled proceeding and that an order settling the bill of exceptions may be signed by the trial judge without the district wherein the trial was conducted, and it further appearing that the November, 1921, term of the Southern District of New York has been kept open by order of the court made from time to time,

It is ordered that the foregoing bill of exceptions be settled and filed with the clerk of the District Court for the Southern District of New York nunc pro tunc as of November 14, 1921.

WM. C. VAN FLEET,
U. S. Dist. Judge.

152 In United States District Court

[Title omitted.]

Amended assignments of error

Now comes defendant, James J. Johnston, and makes the following assignments of error, which he alleges occurred upon the trial of this cause:

1. That the trial court erred in denying the motion of the defendant to quash the indictment in each and every one of the twelve counts thereof, which motion was predicated upon the contention and ground that none of the counts of the indictment set forth any offense or crime against the United States of America.

2. That the trial court erred in permitting evidence to be received under the indictment and the several counts thereof, since the indictment and the several counts thereof are on their face insufficient in law to aver or set forth any offense against the United States, or any offense under any law of the United States or any offense whatever.

3. That the trial court erred in not directing the Jury at the close of the Government's case to find the defendant, James J. Johnston, not guilty.

4. That the trial court erred in not directing the Jury to find the defendant, James J. Johnston, not guilty at the close of the entire case.

153 5. That the verdict of the jury is not supported by any competent evidence on the record and is contrary to law.

6. That the trial court erred in entering judgment against the defendant, James J. Johnston, upon the verdict in this case.

7. That the trial court erred in overruling and denying the motion in arrest of judgment made on behalf of defendant, James J. Johnston.

8. That the trial court erred in overruling and denying the motion to set aside the verdict and grant a new trial herein, made on behalf of defendant.

9. That the trial court erred in his charge to the jury.

10. That the trial court erred in admitting incompetent, irrelevant, and immaterial evidence introduced by the Government.

11. That the trial court erred in overruling the objection of the defendant to the remarks of the district attorney made in his argument to the jury, and particularly with reference to his statement to the following effect: That one Joe O'Brien had been subpœnaed by the Government and had failed to appear, and that the defense failed to put him on the stand, which comment to the jury was prejudicial and unfair.

Wherefore, defendant prays that said judgment and sentence be reversed, set aside and held for naught.

GEORGE E. COUGHLIN,
ARTHUR N. SAGER,
Attorneys for Defendant.

154 [Citation in usual form omitted in printing.]

155 In United States District Court

[Title omitted.]

Stipulation re transcript of record

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record of the said district court in the above entitled matter as agreed upon by the parties.

Dated, New York, November 24, 1922.

WILLIAM HAYWARD,
United States Attorney.
ARTHUR N. SAGER,
Attorney for Plaintiff in error.

156 In United States District Court

[Title omitted.]

Clerk's certificate

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the transcript of the record of the said district court in the above entitled matter as agreed to by the parties.

In testimony whereof, I have caused the seal of said court to be hereunto affixed by the city of New York, in the Southern District of New York, New York, on the 24 day of November, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the said United States the one hundred and forty-seventh, etc.

[SEAL.] ALEXANDER GILCHRIST, JR.,
Clerk.

[24065]

1 United States Circuit Court of Appeals for the Second Circuit

James J. Johnston, plaintiff in error, against The United States of American, defendant in error

Opinion

Before Hough, Manton, and Mayer, Circuit Judges.

Writ of error to the United States District Court for the Southern District of New York. Defendant was charged in eight counts in an indictment, with a violation of sections 800, 802, and 1302 of the internal revenue law (40 Stat., 1057, 1120, 1143) and in four counts in said indictment, he is charged with the crime of embezzlement under section §47 of the Criminal Code. Judgment of conviction; defendant appeals. Reversed.

GEORGE E. COUGHLIN, Esq.,
ARTHUR N. SAGER, Esq.,
Attorneys for Plaintiff in Error.
WILLIAM HAYWARD, Esq.,
United States Attorney.
PETER J. MCCOY, Esq.,
Asst. U. S. Attorney, of Counsel.

158 MANTON, Circuit Judge.

The Central Manhattan Boxing Club, Inc., is a New York corporation. It entered into an agreement on November 26, 1920, the material parts of which were that the plaintiff in error, desiring to exclusively conduct boxing matches as the "agent, matchmaker, and manager of the Manhattan Athletic Club under the character and license held by it for the period of one year," agreed to pay the club seven hundred and fifty dollars a month, except for the months of July and August, "for the aforesaid exclusive arrangement." He agreed to hold at least one boxing match each month, and agreed to pay the club four hundred dollars one week prior to the date set for the boxing match, and three hundred and fifty dollars on the evening of the contest, except that in the months of July and August, he agreed to pay one hundred dollars. He agreed to pay the State tax

of five per cent and the Federal tax of ten per cent. The club agreed to furnish a large hall known as Manhattan Casino, lighted and heated, and with seats, boxes, and ring all arranged for a boxing contest. Plaintiff in error agreed to pay the ticket takers and ticket sellers and other necessary officials, such as the referee, physicians, timekeepers, ushers, and announcers. It was agreed that "boxing shows" should be mutually agreeable to the parties and further that "This contract shall remain in force during the life of the present license held by the Manhattan Boxing Club, Inc., but may be terminated by either party by the giving of ninety days written
159 notice." Under the State law, the boxing commission had authority to grant a license to a corporation only. The plaintiff in error neither applied for nor was he granted a boxing license. The boxing exhibitions were conducted under the sanction and authority of the New York Boxing Commission and the license was issued to the club.

The plaintiff in error has been tried and convicted on an indictment charging in eight counts a violation of §§ 800, 802, and 1308b of the internal revenue law known as the revenue act of 1918 (40 Stat. 1057, 1103, 1120, 1145) and in four counts of embezzlement of Government moneys in violation of § 47 of the United States Criminal Code. The first, fourth, seventh, and tenth counts charge the plaintiff in error with having wilfully failed and refused to account for and pay over sums of money due as an excise tax to the United States on the amount of money received as admissions paid to said exhibitions. This charge is based on § 1308 which provides that "any person who wilfully refuses to pay, collect, or truly account for and pay over any such tax, make such return or supply such information at the time or times required by law or regulation, or who wilfully attempts in any manner to evade such tax shall be guilty of a misdemeanor and in addition to other penalties provided by law shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution."

In counts second, fifth, eighth, and eleventh he is charged with a violation of the same section (sub. div. a), which provides:
160 "That any person required under Titles V, VI, VII, VIII, IX, X, or XII to pay or to collect, account for, and pay over any tax, or required by law or regulations made under authority thereof to make a return or supply any information for the purposes of the computation, assessment, or collection of any such tax, who fails to pay, collect, or truly account for and pay over any such tax, make any such return, or supply any such information at the time or times required by law or regulation shall in addition to other penalties provided by law be subject to a penalty of not more than $1,000.00."

Counts third, sixth, ninth, and twelfth charge an embezzlement in having unlawfully, knowingly, and wilfully embezzled moneys of the United States representing the tax on admissions paid to the exhibi-

tions. Section 47 of the United States Criminal Code makes it a crime for any one to "embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever of the moneys, goods, chattels, records, or property of the United States." The plaintiff in error has no connection as an officer or director of the corporation, and from all that appears in the record, he had but a contractual relation. The boxing club was organized by an attorney who secured a license and thereupon it entered into a contract with the plaintiff in error for conducting boxing exhibitions under its license and for producing the revenue referred to in the contract. Boxing exhibitions were held and admission fees were collected. There is no proof as to the amount of tax collected save such as might be considered included in the admission charges paid. Some free tickets were issued, but there is no evidence to show that a tax was collected with these complimentary tickets when used.

161 The indictment in no way refers to the contract entered into between the parties, and its reading would indicate that the plaintiff in error, by authority of law, had secured a license to conduct the boxing matches, received the admission funds as well as the tax of one cent for every ten cents or fraction thereof, together with the tax on the complimentary tickets, and that this money was collected pursuant to the internal revenue statutes (40 Stat. 1057, 1103, 1120, 1143) in such case made and provided.

At the trial, the Government offered the contract in evidence and proved the facts substantially as stated. The State law providing for a boxing commission and permitting exhibitions in chap. 912 of the Laws of the State of New York of 1920.

Pursuant to the requirements of the State law, the plaintiff in error filed reports for the Central Manhattan Boxing Club, Inc., setting forth the names of the boxers taking part, the duration of the bouts, the decisions, the payments made to the boxers, together with the tax and the gross receipts, net receipts, State tax and Federal tax. He executed this instrument as the matchmaker of the boxing club. These reports were prepared on blanks furnished by the Boxing Commission. Other reports were prepared by the assistant treasurer of the corporation which were to like effect. The tax due the State was paid by the corporation.

It is clear that the plaintiff in error had no right and could not secure a license to conduct boxing contents under the laws of New York, only a corporation could be so licensed. It would

162 have been contrary to the statute for him to have attempted to do so. The enterprise must be considered as that of the corporation. In the legal sense, he was but the agent, matchmaker and manager of the Central Manhattan Boxing Club, Inc. The contract was not a mere renting of the premises. The corporation employed the services of Johnston as well. He paid a fixed sum as stated in the contract, which meant that the club was to obtain the first profits and be assured that they would reach a total sum of

seven hundred and fifty dollars a month. The nature of the business may have demanded that. Whatever may have been the foundation for this arrangement, it was the agreement of the parties. We think that the Federal tax should be paid, as was the State tax, by the corporation. In a legal sense, the box office receipts belonged to the principal or the employer of the plaintiff in error, the corporation. His collection of the admission money was as agent or manager with the vested interest as described in the contract. Therefore, the corporation owning the box office receipts became the custodian of the Federal tax collected to be subsequently paid to the Government. Within the purview of the New York statute permitting boxing exhibitions, he was not the conductor of the contests nor the collector of the money. It is not claimed nor proven that the plaintiff in error aided or abetted the corporation in the wilfull failure to pay the tax.

Nor do we think that there was an embezzlement of the Federal tax as alleged in counts third, sixth, ninth, and twelfth. The moneys collected at the box office were not the property of the United States.

163 The law imposed the duty upon the owner of the enterprise to make returns and pay the tax to the collector of internal revenue. The obligation so to do did not make the moneys those of the United States. The obligation to pay the Government the tax is not complied with until the tax has been paid. The Treasury Department has so considered admission moneys paid to a theatre as a tax which were stolen before payment was made to the Government. (See Internal Revenue Bulletin, Vol. 1, No. 25, issued June 19, 1922, at p. 18.) Treasury decisions such as are regulations of a department of the Government, addressed to and reasonably adapted to the enforcement of an act of the Congress, the administration of which is confided to such department, have the force and effect of law if they be not in conflict with express statutory provisions. (United States vs. Grimaud, 220 U. S. 506; United States vs. Birdsall, 233 U. S. 223; United States vs. Morehead, 243 U. S. 607.) We agree with the result as directed in this ruling (but which does not amount to a regulation) and hold that the moneys received at the box office including the tax, were not the moneys of the United States. It therefore afforded no basis upon which to support an indictment for embezzlement of property of the United States within § 47 of the United States Criminal Code. The motion to direct a verdict of acquittal at the end of the Government's proof and renewed when the defendant rested, without offering evidence, should have been granted.

Judgment is reversed with directions to the district court to dismiss the indictment.

164 In United States District Court

[Title omitted.]

Judgment, filed April 9, 1923

Error to the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is reversed with directions to the district court to dismiss the indictment.

C. M. H.
M. T. M.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

165 [File endorsement omitted.]

166 United States Circuit Court of Appeals

[Title omitted.]

Petition for rehearing and order overruling same

To the Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of the United States of America by William Hayward, United States attorney for the Southern District of New York, respectfully shows:

This cause was argued at the present term on the 6th day of March, 1923, before Judges Hough, Manton, and Mayer. On April 3, 1923, an opinion directing reversal of the judgment of conviction and dismissal of the indictment was filed.

The Government now respectfully petitions for a rehearing for the following reasons:

1. The decision is not in accord with the expressed purpose of the statute imposing admission taxes and providing for the manner of collection.

(Indorsed: United States Circuit Court of Appeals. Second Circuit. Filed Apr. 18, 1923. William Parkin, Clerk.

167 2. It subjects a Federal statute to the inhibition of a State statute and makes the latter a restraint upon the former.

3. The questions involved are of vital importance in administering the act of February 24, 1919, in cases now pending and daily arising.

POINT I

The ruling that the corporation, because it held the State license, was alone answerable for the taxes upon admissions, defeats the plain purpose of Congress to require the person receiving payment for admission, to collect the tax and account for and pay over such tax to the Government.

Under the State law, only a corporation could be licensed to conduct boxing contests. Johnston desired to exclusively conduct such contests (fol. 246). He caused the organization of the corporation to accomplish that purpose. It was incorporated at his expense. He paid the State license fee of $750. He also paid the cost of the necessary bond. The only reason why the corporation was formed was to enable Johnston to lawfully conduct boxing contests. While the license was issued in the name of the corporation, it was personally delivered to Johnston. He possessed it always (fols. 86–87).

Under the contract entered into between the corporation and Johnston, the corporation was obliged to do no more than provide the Manhattan Casino, suitably equipped for boxing contests (fols. 245–255). It will be borne in mind that the Manhattan
168 Casino, Inc., the owner of the hall, leased that hall to the Manhattan Athletic Club of America (fols. 406–417). The latter corporation assigned the lease to Johnston's creation, the Central Manhattan Boxing Club, Inc. (fols. 420–425). While the contests were held under the license granted by the State to the Central Manhattan Boxing Club, Inc., Johnston and his employees were in complete charge of the contests and received the money paid for admission. Johnston paid a specific rental, which was not determinable by the amount of admission receipts, for the use of the hall. He conducted the exhibitions, furnished the ticket takers, ticket sellers, paid the contestants and exercised complete control and dominion over the contests, uninfluenced by the corporation. While he was designated as matchmaker of the club, it can not be truthfully said that he was an agent or employee. The designation was merely a compliance with the State statute. He received no compensation from the club for his services. In fact, he remunerated the club for furnishing him a place wherein he could conduct the contests. He had exclusive and entire charge of the handling and sale of all tickets. The admission receipts were his. The profits belonged to him solely and absolutely. He was an independent contractor, the lessee of the premises and of the corporation's license.

The theory of this court's opinion that the corporation was liable because it alone was lawfully entitled and licensed by the State to conduct the boxing contests practically disregards the purpose of Congress, as expressed in sections 800 and 802 of the act of February 24, 1919.

Section 800 levies a tax of 1 cent for each 10 cents paid for admission to any place, to be paid by the person paying for such

admission. The tax is a levy upon the spectator and not upon the person who conducts or controls the place or exhibition to which admission is sought.

Section 802 provides that every person receiving any payments for such admission shall collect the amount of the tax imposed by section 800 from the person making such payments.

The purpose of Congress is plain and unequivocal. The person collecting admissions is charged with the statutory duty of collecting the tax in addition. Section 802 incorporates the provisions of section 502, which requires the person collecting the admissions to make monthly returns and pay the taxes so collected to the collector of internal revenue.

The purpose and intent of Congress to levy a tax upon the spectator and require the person receiving payment for admission to collect such tax and pay it over to the Government can neither be defeated by a law of the State nor by an agreement which evades the law of the State. The effect of the decision is to limit and restrict the Government, despite the plain and unlimited language of the sections quoted, to the collection of taxes from the person or corporation, who under the State law is lawfully permitted to conduct the amusement.

Congress has enacted that the person collecting payment for admission shall collect the tax, which the spectator is required to pay. It has declared that the person collecting the admission tax shall turn it over to the Government. It did not say that the person authorized to conduct a place of amusement shall collect and account for the tax.

Let it be assumed that a man having a license to conduct a theatre is on his way to the box office to collect admissions and sell tickets. A thief assaults him and takes his keys from his person. The thief goes to the box office and, posing as the licensed theatre owner, sells tickets, receives payment for admissions, and collects the tax which Congress has required the spectator to pay. Will it be said that the Government can not require that thief to account for and pay over the taxes which he has collected upon admissions? He is the person who received payment for the admissions. He is the person who, within the meaning of section 802, is required to collect the tax imposed by section 800. Having collected that tax, he is chargeable with the duty created by section 502 of paying over the tax moneys to the Government. But the State did not license him to operate a theatre.

It must always be borne in mind that the application of sections 800 and 802 is not dependent upon whether the person who collects the admission moneys is or is not authorized to operate or conduct the amusement to which admission is charged. The purpose of Congress is plain. The duty of collecting the tax is upon the person who receives payment for admission. Johnston received payments made by spectators for admission. He collected the tax upon those admissions. He is the person Congress had in mind in enacting

sections 800 and 802. The admission receipts were his. The corporation could neither require him to account for or pay over the admission receipts nor vest it with the possession of the tax moneys.

Suppose that Johnston had never caused the corporation to be organized. Assume no license had ever been issued or sought. Let it be supposed that Johnston, in plain violation of the law of the State, conducted boxing contests without a license. Can it be said that Johnston having no license, as required by the State law, could escape the duty placed upon him of collecting the tax upon payments for admission which he received?

171 It is said that the enterprise was that of the corporation. The agreement of the parties, the evidence and the finding of the jury are not in accord with that conclusion. The corporation was the instrument of Johnston to accomplish his desire and yet comply with the State statute. If the enterprise was that of the corporation, why could not the corporation require Johnston to account to it and pay over to it the admission receipts? If the corporation sued Johnston to account for the admission moneys, it would clearly be met with the contract which entitled it solely and exclusively to a stipulated sum of money, in return for which it rented its hall and rented its license. Whether it rented its license in violation of the State statute is no concern of the Government in its effort to obtain from Johnston the moneys which he collected as taxes upon the payments he received for admission.

Even though it be assumed that Johnston's control of the enterprise was illegal because the State law restricted licenses to corporations only, the Government had the right, in accordance with the purpose expressed in the revenue act, to compel an accounting by the person who received the admission moneys, he being the only person required by section 802 to collect the admission taxes.

The opinion states:

> Within the purview of the New York statute permitting boxing exhibitions, he was not the conductor of the contests nor the collector of the money.

We answer that Congress has not limited the duty under the revenue act to the conductor of an amusement. The duty is upon the collector of admission moneys. To assume that Johnston

172 did not collect the moneys is to declare that the moneys were not collected and overthrow the jury's finding of fact. How can it be said that the corporation collected the moneys when the facts conclusively established that it not only did not receive the moneys, but was not entitled to receive them.

Again, the opinion states:

> It is not claimed or proven that the plaintiff-in-error aided or abetted the corporation in the wilful failure to pay the tax.

Two answers, each complete in itself, may be made to the inference that the judgment of conviction would be valid if it was claimed and proven that Johnston aided or abetted the corporation in the failure to pay the tax.

First, it was not necessary (assuming that the corporation failed to account for and pay over the taxes to the Government), in order to charge Johnston, to allege that he aided or abetted the corporation. He could be charged as a principal.

Vane vs. United States, 254 Fed., 232.

Secondly, a contention that Johnston aided or abetted the corporation, would necessarily presuppose the commission of an offense by the corporation. The corporation neither received nor was entitled to receive the moneys. A prosecution against it could not be sustained. It was never within the corporation's power to fail or wilfully fail to pay the taxes to the Government. Hence Johnston was not chargeable with aiding or abetting a failure, when none existed.

173 POINT II

The tax moneys became the property of the United States the instant they were paid by the spectators to Johnston.

The opinion states:

> The law imposed the duty upon the owner of the enterprise to make returns and pay the tax to the collector of internal revenue. The obligation so to do did not make the moneys those of the United States. The obligation to pay the Government the tax is not complied with until the tax has been paid.

The law imposes upon the person receiving payment for admissions the obligation of collecting a tax from the spectator and the duty to make returns and pay the tax to the collector of internal revenue. It is not contended, as the opinion states, that the obligation to make returns and pay over, renders the moneys those of the United States. It is urged, however, that the duty to collect the tax from the taxpayer (the spectator), when performed, does render the money collected, the money of the United States.

It is true that the obligation to pay the Government the tax is not complied with until the tax has been paid, assuming that passage of the opinion means the payment to the Government by the person who has collected. That transfer is not a payment of the tax. The tax is paid by the spectator. He pays it to the Government by placing it in the hands of the person required by law to collect it and account therefor to the Government.

174 If the moneys did not become the property of the United States at the time they were paid by the spectator, whose property did they become? If the moneys belonged to either the corporation or Johnston, they would be subject to attachment at the hands of their creditors. Obviously, no creditor of Johnston or the corporation could attach the tax moneys, because they were moneys of the United States, the instant they were paid by the spectators. A fortiori, the conversion of those moneys by the holder was embezzlement of moneys of the United States.

POINT III

The court erred in holding that the statements contained in the Internal Revenue Bulletin constitute a regulation of the Treasury Department and have the force and effect of law.

It is respectfully urged that the court has inadvertently overlooked the pronounced distinction existing between a Treasury decision or departmental regulation and a *ruling* contained in an Internal Revenue Bulletin. The Government has specifically pointed out such distinction by the provision on the initial page of all Internal Revenue Bulletins, whereon it sets forth that the rulings contained therein have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury.

It cannot be too forcibly urged that the ruling relied upon
175 in support of the holding that moneys collected as taxes on admissions, are not moneys of the United States until paid to the collector, has not been formally approved and promulgated by the Secretary of the Treasury and has none of the force and effect of a Treasury decision or departmental regulation. Most decidedly, it does not commit the department to such an interpretation of the law.

The cases cited by this court are founded upon departmental decisions and regulations. While this court is free to follow the view expressed in the Internal Revenue Bulletin, it should not do so upon the theory that it is adopting the ruling of a Treasury decision or regulation.

Respectfully submitted,

WILLIAM HAYWARD,
United States Attorney.

JOHN E. JOYCE,
PETER J. McCOY,
Assistant United States Attorneys, of Counsel.

William Hayward, United States attorney for the Southern District of New York, herewith certifies that he has read the foregoing petition; that the same, in his opinion, is well founded in point of law and that it is not interposed for the purpose of delay.

WILLIAM HAYWARD.

176 [Title omitted.]

A petition for a rehearing having been filed herein by counsel for the defendant in error:

Upon consideration thereof it is

Ordered, That said petition be and hereby is denied.

C. M. H.
J. M. M.

177 (Indorsed:) [Title omitted.]

178 United States Circuit Court of Appeals

Clerk's certificate

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 177, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of James J. Johnston, plaintiff in error, against United States, defendant in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 2nd day of May, in the year of our Lord one thousand nine hunderd and twenty-three, and of the independence of said United States the one hundred and forty-seventh.

[SEAL.]

WM. PARKIN, *Clerk.*

179 *Writ of certiorari and return filed Nov. 16, 1923*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which James J. Johnston is plaintiff in error, and the United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
180 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the eleventh day of October, in the year of our Lord one thousand nine hundred and twenty-three.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

181 [Title omitted.]

Stipulation as to return to writ of certiorari

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
ARTHUR N. SAGER,
Counsel for Respondent.

OCT. 15, 1923.

182 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, November 9, 1923.

[SEAL.] WM. PARKIN,
Clerk of the United States,
Circuit Court of Appeals for the Second Circuit.

[File indorsement omitted.]

(Indorsed on cover:) [File indorsement omitted.]

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, PETITIONER,
v.
JAMES J. JOHNSTON, RESPONDENT. } No. —.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit rendered in the above-entitled case on April 9, 1923, reversing a conviction in the District Court.

STATEMENT.

The respondent, James J. Johnston, was indicted in the United States District Court for the Southern District of New York and charged with violations of Sections 800, 802, and 1308 of the Revenue Law known as the Revenue Act of 1918, and with embezzlement of Government money.

After trial and conviction in the District Court the case was taken to the Circuit Court of Appeals

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for the Second Circuit on writ of error, in which court the judgment of the court below was reversed.

Petitioner now seeks a writ of certiorari to review the decision of the Circuit Court of Appeals reversing the conviction in the District Court.

QUESTIONS INVOLVED.

1. Whether a corporation, because it holds a state license, is alone answerable for the payment of taxes on admissions to exhibitions, even though the liability of the corporation defeats the plain purpose of Congress to require the person receiving payment for admissions to collect the taxes and account for and pay them over to the Government.

2. Whether the tax moneys become the property of the United States the instant they are paid by the spectators to the persons in charge of admissions to exhibitions.

3. Whether the court erred in holding that the statements contained in the Internal Revenue bulletin constitute a regulation of the Treasury Department and have the force and effect of law.

FACTS.

The respondent entered into a contract with the Central Manhattan Boxing Club (Inc.) to act as its "agent, match-maker, and manager" for a period of one year. The Central Manhattan Boxing Club (Inc.) was incorporated under the laws of the State of New York and secured a license from the New York State Boxing Commission to conduct boxing

exhibitions at its clubhouse. The contract in part provided that the respondent was to receive the entire proceeds from each boxing exhibition and the exclusive right to conduct such exhibitions in this clubhouse. For this privilege the respondent agreed to pay a certain stipulated amount for each exhibition staged by him. He also guaranteed the presentation of one boxing exhibition per month and agreed to pay the State tax of five per cent and the Federal tax of ten per cent.

In furtherance of this agreement boxing exhibitions or contests were held in the name of the Central Manhattan Boxing Club (Inc.) during the months of February, March, April, and May, 1921. It is for the alleged failure of the respondent to account for and pay the Federal taxes on admissions to said exhibitions that the indictment was returned. It was contended by the respondent, in the Circuit Court of Appeals, that under the law of New York only a corporation could be licensed to conduct boxing contests, and that therefore, within the purview of the New York statute, he was not the conductor of contests nor the collector of money.

REASONS FOR GRANTING THE PETITION.

First, the decision of the Circuit Court of Appeals is detrimental to the interests of the Government in the collection of revenue under the Revenue Law of 1918, as it opens the door to fraudulent transactions.

Second, the question is of grave importance to the administration of the Internal Revenue laws which this decision leaves in confusion.

Third, the Circuit Court of Appeals erred in holding that the corporation, because it held a state license, was alone answerable for the taxes on admissions, as it defeats the plain purpose of Congress to require persons receiving payment for admissions to collect the taxes and to account for and pay them over to the Government.

JAMES M. BECK, *Solicitor General.*
MABEL WALKER WILLEBRANDT,
Assistant Atty. General.

BRIEF IN SUPPORT OF THE PETITION.

1. The Circuit Court of Appeals erred in holding that the corporation, because it held a State license, was alone answerable for the taxes on admissions, as such holding defeats the plain purpose of Congress to require persons receiving payment for admissions to collect the taxes and to account for and pay them over to the Government.

The New York State law provides that only a corporation can be licensed to conduct boxing contests. Respondent caused the organization of the Central Manhattan Boxing Club (Inc.), paid the incorporation expenses, the State license fee, and the cost of the necessary bond. Respondent then entered into a contract with this corporation for the purpose of conducting boxing exhibitions, wherein he is referred to as agent, match maker, and manager. Evidence was introduced at the trial to show that this provision in the contract was a mere subterfuge to circumvent the law of the State of New York. Respondent paid a specified rental, conducted the exhibitions, paid the contestants, and at all times exercised complete control over the contest uninfluenced by the corporation. Respondent at no time received remuneration from the Central Manhattan Boxing Club (Inc.) for his services.

It is respectfully contended by the petitioner that the view taken by the court would render the State law paramount to the Revenue Act of 1918 passed by Congress under authority of the Sixteenth Amendment to the Constitution.

The purpose of Congress is plain and unequivocal. The person collecting admission is charged with the statutory duty of collecting the tax in addition. Section 802 incorporates provisions of Section 502 requiring the person collecting the admissions to make monthly returns and pay the taxes so collected to the Collector of Internal Revenue.

The respondent in the instant case, under the decision of the Circuit Court of Appeals, escapes the duty placed upon him of collecting the tax and paying the same and the penalty for failure to make such return, simply because the law of the State of New York makes it impossible for him to conduct boxing exhibitions. A decision of this kind, if allowed to stand, opens the door to fraud and allows criminals to escape punishment for violation of the Federal statute.

2. The tax moneys become the property of the United States the instant they are paid by the spectators to the person in charge of admissions.

Petitioner respectfully contends that the duty to collect the tax from the taxpayer, when performed, renders the money collected the money of the United States. The taxpayer pays this money to the Government by placing it in the hands of the person required by law to collect it and account therefor to the Government. It is apparent that the money collected does not belong in the instant case to either the corporation or the respondent. It is reasonable to believe that this money becomes the property of the United States the instant it is paid

by the spectator. It would follow, therefore, that the conversion of this money by the holder was embezzlement of money of the United States.

3. The Circuit Court of Appeals erred in holding that the statements contained in the Internal Revenue Bulletin constitute a regulation of the Treasury Department and have the force and effect of law.

The petitioner respectfully points out that on the initial page of all Internal Revenue bulletins it is set forth that the rulings contained therein have none of the force or effect of Treasury decisions, and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury. Petitioner contends that the ruling relied upon by the respondent does not commit the Department to such an interpretation of the law.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, to the end that it may be reversed.

JAMES M. BECK, *Solicitor General.*
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

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CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES OF AMERICA
v.
JAMES J. JOHNSTON
No. 111

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT OF THE CASE

The defendant, James J. Johnston, was convicted in the United States District Court for the Southern District of New York under an indictment which charged violation of section 47 of the Penal Code (embezzlement) and violation of sections 800, 802, and 1308 of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1120, 1143). The charges arose out of the failure of the defendant to account for or to pay entertainment admission taxes, under circumstances set forth in detail below.

On writ of error, the Circuit Court of Appeals for the Second Circuit reversed the conviction and ordered the indictment to be dismissed. The opinion of the Circuit Court of Appeals is reported in 290 Fed. 120, and appears also at R. pp. 85–88. A petition for rehearing was denied. The United States then petitioned this Court for a writ of certiorari to review the judgment of the Circuit Court of Appeals, on the ground that the questions involved were of importance to the administration of the revenue laws, and that the decision below defeated the plain purpose of the statute and opened the door to fraudulent transactions. This Court, on October 8, 1923, granted the writ of certiorari, 263 U. S. 692.

The charges upon which the defendant was tried arose out of his failure to account for, or to pay, entertainment taxes upon boxing contests which were conducted by him at the Manhattan Casino in New York City. The indictment (R. pp. 2–8) contains twelve counts, upon all of which the defendant was found guilty. Count 1 charges a *willful refusal to pay over* to the Government the sum of $618, which was the amount of entertainment tax due on a boxing contest held in the month of February, 1921. Count 2 charges a *failure to make a return* to the Collector of Internal Revenue of the money collected for admissions to this same contest. Count 3 charges an *embezzlement* of the same sum of $618, " which was then and there money of the United States."

Counts 4–6 repeat the same three charges with respect to boxing contests held during March; counts 7–9, with respect to contests in April; and counts 10–12, with respect to contests in May. The indictment thus covers a period of four months in 1921. The aggregate value of the tickets disposed of during this period amounted to $64,039.90. The entertainment tax of 10%, plus penalties for delay, amounted to $8,324.84. Aside from one part payment of $250, none of this tax was ever paid to the Collector (R. p. 43); nor was any return made to him.

The Government's evidence was uncontradicted. It showed that boxing exhibitions were conducted by the defendant under a license issued by the State Athletic Commission to the *Central Manhattan Boxing Club, Inc.*, a corporation organized under the laws of New York. (R. pp. 47, 74.) Under the law of that State, licenses were required for the holding of boxing contests; these could be issued only to domestic corporations, and not to individuals. (R. p. 30) N. Y. Laws, 1920, c. 912; printed *infra* as an Appendix, p. 32. It was solely for the purpose of compliance with this law that the Central Manhattan Boxing Club was formed. (R. p. 11.) The defendant Johnston paid the expenses of incorporating it. He also paid the cost of the boxing license, amounting to $750, and of the bond, amounting to $50. (R. p. 15.) The club took an assignment of a lease of the Man-

hattan Casino (R. pp. 78–79), a large hall, where the contests in question were subsequently held.

The defendant, Johnston, entered into a contract with the Club (R. pp. 47–49) whereby he undertook "*to exclusively conduct boxing contests*" as its "*agent, matchmaker, and manager.*" He agreed to pay the Club a fixed minimum rent of $750 per month for the use of the Casino, except in July and August, when the rent was to be $500 per month. This minimum rent was to be paid in case no boxing contest, or one contest only, should be held during the month. For each additional contest beyond one per month, Johnston was to pay $500 to the Club. *Johnston further agreed to pay the State and Federal entertainment taxes.* He agreed to reimburse the Club for all penalties imposed by the State boxing commission. He agreed to pay all ticket takers, ticket sellers, ushers, referees, and other officials; and in every contract with these employees was to be inserted a clause that Johnston was solely responsible for their wages. The contract further provided:

> *The party of the second part* [Johnston] *is to have entire charge of the handling and selling of all tickets* and shall have exclusive control of all complimentary and press tickets. (R. p. 49.)

It was under this contract that the defendant conducted the boxing contests set forth in the indictment; and under this contract he was allowed and assumed full control. (R. p. 25.) He paid

the rent of the Casino as agreed. (R. p. 15.) He received all the mail directed to the Club. (R. p. 19.) He managed all the bouts. (R. p. 19.) He took possession of the Club's boxing license, under which he acted, and refused to surrender it when demand was made. (R. p. 20.) On one occasion, when the Casino was used for a charity performance, he permitted a third party to use the license, and was paid $500 for the permission. (R. p. 16.)

The defendant appointed as his assistant one Joseph M. O'Brien, who assumed (without any authority from the directors) the title of Assistant Treasurer of the Club. (R. pp. 18, 25.) O'Brien paid all the employees. (R. p. 15.) The reports which were required by the State Boxing Commission from all license holders were signed by O'Brien or by the defendant himself, and not by any officer of the Club, which was the nominal holder of the license. (R. pp. 21–23; Govt. Exhibits 3, 6, 8, 9, 11, 13, 15, 17; R. pp. 50, 54, 56, 58, 61, 65, 67, 70.)

The State entertainment tax of 5% on admissions was likewise paid, and the tax reports submitted to the State Treasurer, by O'Brien, in his assumed capacity of Assistant Treasurer of the Club. (Govt. Exhibits 5, 7, 10, 12, 14, 16, 18; R. pp. 52, 55, 60, 63, 66, 69, 72.)

In only one case was the report made by an officer of the Club. (Govt. Exhibit 4, R. p. 51.) The Federal tax remained unpaid. (R. p. 41.)

The defendant did not take the stand in his own behalf, nor did he call any witnesses. A verdict of

guilty was recorded upon all twelve counts of the indictment, with a recommendation of mercy; and the defendant was sentenced to pay a fine of $500 and to be imprisoned for sixty days.

On writ of error, before the Circuit Court of Appeals, it was contended that the defendant could not be held liable for the tax, because under State law *the Club alone* (and not the defendant) was licensed to conduct the boxing contests on which the tax was due. It was further contended that no conviction could be had for embezzlement on counts 3, 6, 9, and 12, for the reason that entertainment taxes are not " moneys of the United States " until they have actually been paid over to the Collector of Internal Revenue. Both of these contentions were accepted by the Circuit Court of Appeals.

It will be seen, therefore, that this case involves two principal questions:

1. Whether a corporation (the Central Manhattan Boxing Club), *because it holds a State license*, is alone answerable for the payment of taxes on admissions to exhibitions, even though the liability of the corporation defeats the plain purpose of Congress to require the person (Johnston) receiving payment for admissions to collect the taxes and account for and pay them over to the Government.

2. Whether the tax moneys become the property of the United States the instant they are paid by the spectators to the persons in charge of admissions to exhibitions.

In connection with question 2, there arises a subordinate question, set forth in the Government's petition for certiorari, namely—

3. Whether the Circuit Court of Appeals erred in holding that certain statements contained in the Internal Revenue Bulletin constitute a regulation of the Treasury Department and have the force and effect of law.

Besides the three questions set forth above, there are other assignments of error which were argued on behalf of the defendant in the Circuit Court of Appeals, but which were not made the ground of decision in that Court. These will be briefly considered herein, after the principal questions have been discussed.

STATUTES INVOLVED

In Title VIII of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1120), are to be found the following provisions:

> SEC. 800 (a) That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by Section 700 of the Revenue Act of 1917—
>
> (1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission.
>
> SEC. 802. That every person (a) receiving any payments for such admission, dues, or

fees shall collect the amount of the tax imposed by Section 800 or 801 from the person making such payments, or (b) admitting any person free to any place for admission to which a charge is made, shall collect the amount of the tax imposed by section 800 from the person so admitted. Every club or organization having life members, shall collect from such members the amount of the tax imposed by section 801. In all the above cases returns and payments of the amount so collected shall be made at the same time and in the same manner as provided in Section 502.

Section 502 of this Act is included in Title V (40 Stat. 1057, 1103). It provides:

SEC. 502. That each person receiving any payments referred to in section 500 [transportation taxes] shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located.

* * * * *

The returns required under this section shall contain such information, and be made at such times and in such manner, as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

> The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

Section 1308 of the same Act is included in Title XIII (40 Stat. 1057, 1143). It provides:

> SEC. 1308 (a). That any person required under Titles V, VI, VII, VIII, IX, X, or XII, to pay, or to collect, account for and pay over any tax, or required by law or regulations made under authority thereof to make a return or supply any information for the purposes of the computation, assessment or collection of any such tax, *who fails to pay,* collect, or truly account for and pay over any such tax, *make any such return* or supply any such information at the time or times required by law or regulation shall in addition to other penalties provided by law be subject to a penalty of not more than $1,000. [Italics ours.]

Counts 2, 5, 8, and 11 of the indictment, charging a *failure to make returns,* are based upon this subsection.

> SEC. 1308(b). Any person who *willfully refuses to pay,* collect, or truly account for and pay over any such tax, make such return or supply such information at the time or

times required by law or regulation, or who willfully attempts in any manner to evade such tax shall be guilty of a misdemeanor and in addition to other penalties provided by law shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution. [Italics ours.]

Counts 1, 4, 7, and 10 of the indictment, charging a *willful refusal to pay* the tax, are based upon this subsection.

> SEC. 1308 (d). The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Section 1309 of the same Act (40 Stat. 1057, 1143) provides:

> That the Commissioner, *with the approval of the Secretary,* is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act. [Italics ours.]

Section 47 of the Penal Code provides:

> Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

Counts 3, 6, 9, and 12 of the indictment, charging an embezzlement of the tax moneys, are based upon this section.

It should be noted further that under the power conferred by section 1309, supra, the Treasury Department promulgated a regulation requiring the return to be filed and the tax to be paid on or before the *last day of the month following* that in which the entertainments were held. Treasury Department, Internal Revenue Regulations 43, part 1, Art. 63, p. 97, approved January 26, 1921.

ARGUMENT

I

This Court has jurisdiction to grant certiorari at the suit of the Government in a criminal case.

It is not necessary to argue this proposition at length, as it is presumed that the Court considered the matter when it passed upon the petition for certiorari in 263 U. S. 692, and when it granted a similar petition at the suit of the Government in *United States* v. *Gulf Refining Co.*, 262 U. S. 738. It is sufficient to submit that the former holding of this Court in *United States* v. *Dickinson*, 213 U. S. 92, is not now an authority to the contrary, in view of the significant changes which have been made in the statute since that case was decided. Under Section 240 of the Judicial Code, as it now stands, this Court may grant certiorari in any case, *civil or criminal, upon the petition of any party,* including the United States. (Act of March 3, 1911,

c. 231, s. 240, 36 Stat. 1087, 1157, amending the Act of March 3, 1891, c. 517, s. 6, 26 Stat. 826, 828.)

An examination of the committee reports, and of the statements made by committee members upon the floor of the Senate, clearly shows that the framers of that section of the Judicial Code intended that the United States should be permitted to bring up criminal cases from the Circuit Courts of Appeals by certiorari. The section was, in fact, amended during its passage through the Senate, in order to accomplish that result. Congressional Record (61st Congress, 3rd Session), vol. 46, part 3, p. 2134; vol. 46, part 4, pp. 3762, 4000, 4001.

II

Coming now to the merits of the case, the Government submits that the Circuit Court of Appeals was in error when it held that the Central Manhattan Boxing Club, Inc., and not the defendant Johnston, was liable for the payment of the taxes in question.

The relationship between the Club and Johnston was fully brought out at the trial, and has been set forth at length above at pp. 3–5. It is very clear that the Club was formed and the license procured at Johnston's request, at Johnston's expense, and for Johnston's benefit. The sole reason for its existence is to be found in the provision of the State laws which permitted only *incorporated* clubs to hold boxing licenses. (R. pp. 11, 15, 30.) The whole device was merely a subterfuge to permit Johnston to do indirectly through the medium of a

corporation what the State law prevented him from doing directly as an individual. If he goes further and seeks also to use the corporate entity as a device for evading payment of the Federal tax, he can none the less be punished. One may be liable criminally for acts done under the cloak of corporate existence, even though the corporation is a separate entity.

> *United States* v. *Lehigh Valley Railroad Co.*, 220 U. S. 257, 274.
>
> *In re Rieger, Kapner and Altmark*, 157 Fed. 609.
>
> *Wood* v. *United States*, 204 Fed. 55, 58.

In this case, however, it is submitted that the acts charged in the indictment were from beginning to end the direct acts of the defendant Johnston alone. The contract between the Club and Johnston (R. pp. 47–49) was in reality nothing more nor less than a lease to the defendant of the Manhattan Casino for a specified cash rent, and was so understood by all parties. (R. pp. 19–20.) Johnston, as lessee, controlled all the arrangements for the contests, sold the tickets, and collected the tax. (R. p. 25.)

Johnston had agreed with the Club that he would pay both State and Federal taxes. (R. p. 48.) His assistant, O'Brien, actually did pay the State tax in full (supra, p. 5), submitting over his signature the reports required by the State Treasurer. But neither he nor anyone else took any steps toward paying over the Federal tax to the Collector of Internal Revenue.

Yet in spite of all these facts, the Circuit Court of Appeals reached the conclusion that Johnston could not be held liable for the *Federal* tax, because the *State* law recognized the Club alone as the holder of the license.

It is submitted that this conclusion in effect renders the Federal taxing power subordinate to the legislation of the State, and contravenes the plain purpose of the statute. The Revenue Act of 1918 (Act of February 24, 1919, c. 18, ss. 800, 802, 40 Stat. 1057, 1120), requires that the tax shall be *paid by the spectators and collected by the person who receives the payments from the spectators,* supra, p. 7. The Act looks to the person who is in actual control of the admissions. Through him, or through his box-office assistants, the Federal Government collects the tax from spectators. From him it requires an accounting to be made to the Collector of Internal Revenue. To say that he is excused from making that accounting because, under State law, he had no license to conduct the entertainment, is manifestly absurd. The Club in this case never received any part of the admission charges as such. It was not entitled to receive them. It received only a monthly rent in cash from Johnston for the use of the Casino. Johnston or his assistants collected the admissions and paid the State tax; Johnston should likewise have been held liable to account for the Federal tax.

There is an authoritative ruling of the Treasury Department, approved by the Secretary, which, it

is submitted, covers such cases, and is to be supported alike by sound sense and by the language of Section 802 of the Revenue Act of 1918.

> Whenever a theater, hall, park, ballroom, or other place is leased for any occasion, there is imposed on the lessee, by the provisions of the Act, the duty of collecting any taxes due on admissions to such place on that occasion.
>
> * * * * *
>
> Where a person, society, or organization acquires the right to dispose of all the admissions to any place for one or more occasions the transaction amounts to a lease of such place within the meaning of this Article.
>
> [Treasury Department, Internal Revenue Regulations 43, part 1, Art. 64, page 98, approved January 26, 1921, by the Secretary of the Treasury, under the powers conferred by section 1309 of the Revenue Act of 1918.]

In the present case, the defendant Johnston had *acquired the sole right* to dispose of all admissions to the Manhattan Casino. (R. p. 49.) The arrangement was clearly a lease as contemplated by the ruling above quoted; and Johnston was the person receiving box-office payments. He was, therefore, the person to whom the Act looked for an accounting of the tax moneys.

III

Even if it be held that the Club was also liable for the tax, the defendant Johnston was none the less properly convicted.

The relevant sections of the Revenue Act of 1918 have been set forth above, pp. 7–10. Their effect can be briefly summarized. By sections 1308(a) and 1308(b), penalties are imposed upon any "*person*" who fails to make returns, or who willfully refuses to pay the tax. By section 1308(d), the term "*person*" is made to include any "officer or employee of a corporation" who, as such officer or employee, is under a duty to make the return or to pay the tax.

Reasons have been given above in point II to show that Johnston was the lessee of the Casino, where the contests were held, that he had entire control of the Club's activities so far as the contests were concerned, and that he collected all admissions for his own exclusive profit. The finding of the jury shows that this is the true view of the facts.

But even if it is not true, only one alternative remains. If Johnston was not solely liable on his own account, then he was liable as the "agent, matchmaker, and manager" of the Club. On this alternative theory, section 1308(d) of the Act would apply. If not an "*officer*" of the Club, Johnston was at least an "*employee*" within the meaning of section 1308(d); and he was under a duty imposed by written contract to make the returns and to pay the tax. In this view of the facts, it matters not that the Club might have been held liable for the tax or that the Club might also have been in-

dicted. The defendant Johnston, being the "employee" whose duty it was to pay the tax, may be indicted for failure to do so, regardless of any additional remedy which the United States might have against the Club.

Even assuming that the Club failed to account for the taxes, it was not necessary to charge that Johnston had aided or abetted in the failure. Under section 1308 (d), and section 332 of the Penal Code, he could be charged as a principal.

Harris v. United States, 273 Fed. 785, 790 (certiorari denied, 257 U. S. 646).

Kelly v. *United States,* 258 Fed. 392, 401 (certiorari denied, 249 U. S. 616).

Vane v. *United States,* 254 Fed. 32.

It is submitted, however, that in no event was the Club liable to pay the tax, for the Club did not collect the admissions and was not entitled to receive them. But whether the Club is liable or not, the defendant Johnston is.

IV

The opinion of the Circuit Court of Appeals is based chiefly upon the provisions of the New York State law with regard to boxing licenses, to which allusion has already been made.

It is manifest that the State law can not control the decision of this case. The question as to the *right* of Johnston, under State law, to conduct boxing contests, is altogether irrelevant. The fact re-

mains that he did conduct them; and that fact alone suffices to render him liable for failure to pay the Federal tax.

The agencies of the Federal Government, and particularly its agencies of taxation, are not subject to State control; nor is the scope of their duty to be interpreted by State laws.

McCulloch v. *Maryland,* 4 Wheat. 316, 431.
License Tax Cases, 5 Wall. 462, 473.

The Revenue Act of 1918, as has been seen, places the duty of collecting the tax upon the person who collects the admission charges. It matters not that some one else, under State law, should have collected them.

It is said that the enterprise was that of the Club alone. The agreement of the parties, the evidence, and the finding of the jury are not in accordance with that conclusion. The Club was the instrument of Johnston to accomplish his desire and yet to keep within the letter of the State law. Whether the Club in fact rented its license to Johnston in violation of the State law is no concern of the Federal Government. Johnston alone collected the admissions. Johnston alone, under his agreement with the Club, had the right to collect those admissions. And having collected them, Johnston is the person to whom the Federal Government is entitled to look for payment of the tax.

The absurdity of resorting to State laws for the purpose of construing or limiting the Federal tax-

ing power is well shown by the language of this Court in the *License Tax Cases,* 5 Wall. 462, 473:

> There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union. * * *
>
> * * * The remaining question is, whether the defendant, indicted for carrying on a business on which a special tax is imposed by the internal revenue law, but which is prohibited by the laws of New York, can be convicted and condemned to pay the penalty imposed for not having paid that tax.
>
> What has been already said sufficiently indicates our judgment upon this question.

V

We come now to the consideration of the second main point involved in the decision of the Circuit Court of Appeals. Counts 3, 6, 9, and 12 of the indictment charge an *embezzlement* of the tax moneys by Johnston. The Circuit Court of Appeals held that the tax moneys never became the moneys of the United States, and therefore could not be embezzled. This holding was based upon the theory that the person collecting an admission

tax is a debtor to the United States, and that property in the tax moneys does not pass to the Government until those moneys are actually paid to the Collector of Internal Revenue.

It is submitted that this theory is incorrect. A collector of tax moneys is not a debtor to the United States; he is a bailee.

> *United States* v. *Thomas,* 15 Wall. 337, 352.

The Revenue Act of 1918 imposes upon the person receiving admissions the duty of collecting the tax from the spectators. The amount of that tax is kept separate from the price of admission; and the regulations of the Treasury Department (made in pursuance of section 1309 of the Act) require that the price of admission, the amount of the tax, and the total of admission plus tax be printed *as separate items* on every ticket sold. Treasury Department, Internal Revenue Regulations 43, part 1 (approved January 26, 1921), Art. 51, p. 82.

It is submitted that the clear purpose of both the law and the regulations is to impose upon the person collecting admissions the capacity *quoad haec* of a Government agent. He is the instrumentality through which the United States takes in the tax directly from the spectators. He is, so far as those taxes are concerned, in the position of a Government collector, like the Collector of Internal Revenue himself. And since this is the case,

it necessarily follows that the tax moneys become the property of the United States the instant they are paid at the box office.

The tax is imposed by section 800 of the act upon the *spectator*. His duty is discharged when he pays it at the door of the theater or other place of entertainment. If the person who collects the admissions fails to account to the Government for the tax, it would be absurd to hold that the spectator must pay it a second time.

The case is not analogous to that of income taxes or other taxes of that nature. Obviously, it can not be argued that the individual citizen who pays an income tax is a collector for the Government. He is not a bailee of the United States; he is a debtor for the amount of the tax; and nothing short of payment will discharge him. The tax, until paid, remains a part of his general property, and does not belong to the United States. But the collector of entertainment taxes stands upon a different footing. The tax is not upon him; it is upon the spectator. His duty is to collect the tax from the spectator. He collects it, and it comes lawfully into his possession, as the agent of the United States; and if he converts it to his own use, he commits the crime of embezzlement.

Grin v. *Shine*, 187 U. S. 181.

United States v. *U. S. Brokerage and Trading Co.*, 262 Fed. 459.

Schell v. *United States*, 261 Fed. 593.

VI

The Circuit Court of Appeals, however, reached a contrary view, largely in reliance upon a ruling of the Bureau of Internal Revenue in 1922, based upon the Revenue Act of 1921 (Act of November 23, 1921, c. 136, s. 800, 42 Stat. 227, 289).

That ruling is reported in the Internal Revenue Bulletin, volume 1, No. 25 (June 19, 1922), at page 18. It arose from a case where theatre admission taxes to the amount of $112.15, included in a larger amount of money, were stolen from the safe of the theatre owner. The owner inquired whether the taxes thus stolen had become the property of the Government so as to relieve him from payment of the tax. The Bureau decided that his obligation to the Government was not complied with until the tax was actually paid; and that accordingly the $112.15 collected as admission tax was not the property of the Government at the time it was stolen.

The Circuit Court of Appeals seems to have treated this decision as authoritative. For although the Court said that it did not "amount to a regulation," it referred to it in the following language:

> Treasury decisions such as are regulations of a department of the Government addressed to and reasonably adapted to the enforcement of an act of the Congress, the administration of which is confided to such department, have the force and effect of law if they be not in conflict with express statutory provisions. [290 Fed. 120, 123.]

It is submitted that this decision, whatever may be its merit, is not a regulation having the force of law; and it is further submitted that in any event it can not be supported by the statute.

In the first place, it must be noted that upon the cover of the Bulletin in which the decision is reported there appear the words:

> The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Revenue Acts; *they have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury.* Each ruling embodies the administrative application of the law and Treasury Decisions to the entire state of facts upon which a particular case rests. It is especially to be noted that the same result will not necessarily be reached in another case unless all the material facts are identical with those of the reported case. As it is not always feasible to publish a complete statement of the facts underlying each ruling, there can be no assurance that any new case is identical with the reported case. As bearing out this distinction, it may be observed that the rulings published from time to time may appear to reverse rulings previously published. [Italics ours.]

The decision in question clearly is not an authoritative Treasury regulation made in pursuance of the statute. It does not bind either the Department or the Courts. And if the reasoning given above under point V is sound, then this decision represents an erroneous view of the law.

It is a manifest hardship, and it is not the purpose of the Act, to impose upon the collector of entertainment taxes the obligation of a debtor, who is bound at all events to pay. It is submitted that a sound interpretation of the law would hold him liable as a special bailee.

United States v. *Thomas,* 15 Wall. 337.

If the defendant Johnston is viewed as a special collector (and it is submitted that this view is the true one), then he is a bailee of the tax money; and his possession is in its inception lawful. He is bound to keep the tax moneys separate from his own private funds. If he intermingles the two, and converts the whole to his own use, he is properly charged with embezzlement.

Moore v. *United States,* 160 U. S. 268.

Nor does it matter that the defendant collected, at the same time, both the tax moneys and the admission charges, and that he was entitled to retain the admission charges as his own. The right of the defendant to retain part of the sum is irrelevant to the question whether he has committed embezzlement of the whole or of another part.

United States v. *U. S. Brokerage and Trading Co.,* 262 Fed. 459.

VII

In any event, however, the conviction and sentence in the present case may be supported, regardless of the counts which charge embezzlement. The defendant was found guilty upon all twelve counts of the indictment. He was sentenced to $500 fine and sixty days' imprisonment. The fine is of an amount which may be supported under any one of the counts. The prison sentence may be supported under any of the counts except 2, 5, 8, and 11, which authorize only a fine. Hence, even should this Court decide that the tax moneys were not moneys of the United States, and that the embezzlement counts (3, 6, 9, and 12) cannot, therefore, be supported, the fine is still good under counts 1, 2, 4, 5, 7, 8, 10, and 11, or any of them; and the prison sentence is good under counts 1, 4, 7, and 10, or any of them. So, if any of these counts is good, and is supported by sufficient evidence, the conviction will stand.

Abrams v. *United States* 250 U. S. 616, 619.
Claassen v. *United States,* 142 U. S. 140, 147.

VIII

Finally there remain certain assignments of error which were relied upon by the defendant in the Circuit Court of Appeals, but upon which that Court did not rely as the grounds of its decision. These may be briefly noticed.

A. The defendant contended that it was error to permit the witness Hayden to testify over objections. (R. pp. 10–25.) Hayden was an attorney.

It was contended that his testimony was based upon confidential communications from the defendant, who, it is argued, was his client at the time.

This contention cannot be supported by the facts. At the time when Johnston entered into the contract with the Club (R. pp. 47–49), as well as during the period covered by the indictment, Hayden was not acting as Johnston's attorney. (R. pp. 10, 16.) His only connection with the matter appears to have been based upon his interest in the Club, in the organization of which he had assisted. His knowledge was gained, not as an attorney (least of all as Johnston's attorney), but as a financial supporter of boxing contests. So far as he acted in his capacity of attorney, he seems to have acted for himself, for the owners of the Manhattan Casino, and for the directors of the Club. Moreover, no *confidential* communications ever appear to have been made to him by Johnston. Even if it be held that Johnston was his client, still a large part of his information was not derived from Johnston. And what he did learn from Johnston was communicated to him in the presence or with the knowledge of other persons—directors of the Club, witnesses to the contract, etc. In such cases, even assuming that the parties are attorney and client, the communication is not privileged.

Laflin v. *Herrington,* 1 Black. 326, 339.
York v. *United States,* 224 Fed. 88.
Thompson v. *Cashman,* 181 Mass. 36.
People v. *Andre,* 153 Mich. 531, 540.
Matter of King v. *Ashley,* 179 N. Y. 281.
Doheny v. *Lacy,* 168 N. Y. 213, 223.
People v. *Buchanan,* 145 N. Y. 1, 25.

It is submitted, therefore, that under these circumstances no prejudicial error was committed in permitting Hayden to testify.

B. The defendant contends that the embezzlement counts are fatally defective because they fail to employ the word "*feloniously.*"

These counts (3, 6, 9, and 12) are identical in language, except as to amounts and dates. Each count charges that the defendant "unlawfully, knowingly, and willfully embezzled the sum of ————, which was then and there money of the United States, in the following manner, to wit * * *." There then follows a description of the manner in which the money came into the hands of the defendant. The indictment then alleges that he collected it—

> under the provisions of said revenue act of 1918 for and on behalf of the United States, and it was the duty of the defendant to account for the said sum to the United States, and the defendant unlawfully, knowingly, and willfully failed to pay the said sum to the United States and converted the same to his own use.

This language clearly apprises the defendant of the charge which he was called upon to meet. It contains every ingredient required to charge the crime of embezzlement under section 47 of the Penal Code.

Grin v. *Shine,* 187 U. S. 181.

Claassen v. *United States,* 142 U. S. 140, 146.

United States v. *Harper,* 33 Fed. 471.

The words " unlawfully, knowingly, and willfully" are sufficient to show the criminal intent. There is no need to add " feloniously."

Bannon and Mulkey v. *United States,* 156 U. S. 464.

United States v. *Staats,* 8 How. 41.

Even if the omission of the word " *feloniously* " is error, it is not fatal error under section 1025 of the Revised Statutes; nor is it prejudicial error under section 269 of the Judicial Code as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181.

Frisbie v. *United States,* 157 U. S. 160.

The use of that word may have had, at one time, a proper meaning; but at the present date it has no practical purpose; and its omission can not prejudice the defendant.

As the Supreme Court of New Hampshire said in *State* v. *Felch,* 58 N. H. 1, 2:

> What would " feloniously " mean in this indictment? Would it inform the defendant that, in England, felony was formerly punished by forfeiture, and, generally by death? An indictment is an accusation, and not historical instruction. Would it inform him that New Hampshire punishes his crime either by death or state prison? That would be a statement of law, deficient in certainty; and an indictment is a statement, not of law, but of fact. 1 Bishop Cr. Pro., ss. 52, 53, 274, 275. Would it charge him with knowledge of the burglary, or an intent to assist the burglar in escaping punishment? That

knowledge and that intent are fully and plainly, substantially and formally, charged in other and appropriate words. Would it signify that his knowledge, his intent, or his act, was felonious? That would be a hint concerning the penalty; and the penalty, being matter of law, need not be suggested. Would it signify that his knowledge, his intent, or his act, was criminal? That would be an unnecessary averment of law. Would it be a memorial of the general confederacy among English prosecutors, witnesses, juries, judges, and ministers of the crown, in favor of life, to prevent the enforcement of a code of two hundred capital crimes? 2 Paterson Liberty of the Subject, 309, 310. It is not necessary that the grand jury should thus remind the accused or the court that there is no legal or moral ground on which such a confederacy can survive the reason and object of its existence. *Darling* v. *Westmoreland,* 52 N. H. 401, 407, 408.

C. It was also argued below that counts 1, 2, 4, 5, 7, 8, 10, and 11 were defective in that they failed to describe the offense with sufficient particularity.

Counts 1, 4, 7, and 10 are based upon section 1308(b) of the Revenue Act of 1918, and charge a *willful* refusal to pay the tax. Counts 2, 5, 8, and 11 are based upon section 1308(a), and charge a *non-willful* failure to make tax returns.

It is sufficient to invite the attention of the Court to a comparison of these counts with the statutes under which they are drawn. Every element of the

offense, as set forth in the statute, is minutely charged in each count. The dates of the contests, the amounts of the tax due, the duty of the defendant as a person required to collect the taxes and to make returns, and his failure to account or to make returns, are all set forth. The defendant was given ample notice of every item of the charges which he was required to meet. No demurrer or motion to quash was interposed by the defendant before trial; nor did he request a bill of particulars. He can not attack the indictment now.

Revised Statutes, 1025.

Judicial Code, s. 269, as amended by the Act of February 26, 1919, c. 48 (40 Stat. 1181).

Holmgren v. *United States,* 217 U. S. 509.

Armour Packing Co. v. *United States,* 209 U. S. 56.

IX

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed; and the judgment of conviction should be affirmed.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.

APRIL, 1925.

APPENDIX

Laws of the State of New York, 143rd Session, 1920, Chapter 912 (N. Y. Laws, 1920, vol. 3, page 2333).

An Act Allowing and regulating boxing and sparring matches, and establishing a state boxing commission, and making an appropriation therefor.

Became a law May 24, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. State boxing commission established; terms; salaries; offices; organization. The governor shall appoint three persons, who shall constitute a state boxing commission. One of such commissioners shall hold office for a term to expire January first, nineteen hundred and twenty-two, one for a term to expire January first, nineteen hundred and twenty-three, and one for a term to expire January first, nineteen hundred and twenty-four. Their successors shall be appointed for a term of two years. Each member of the commission shall receive an annual salary of not to exceed five thousand dollars, and his actual and necessary traveling and other expenses incurred by him in the performance of his official duties. The commission shall maintain in the city of New York general offices for the transaction of its business. The members of the commission shall, at their first meeting after their appointment, elect one of their number chairman of the commission, shall adopt a seal for the com-

mission, and make such rules for the administration of their office, not inconsistent herewith, as they may deem expedient; and they may thereafter amend or abrogate such rules. Two of the members of the commission shall constitute a quorum to do business; and the concurrence of at least two commissioners shall be necessary to render a determination by the commission.

SEC. 2. Deputies; secretary; salaries and expenses; report to legislature. The commission may appoint and at pleasure remove not to exceed four deputies who shall be paid a per diem compensation of not to exceed twenty-five dollars for each day actually engaged in the discharge of their duties and all necessary expenses for traveling and maintenance during actual engagement. The commission shall direct a deputy to be present at each place where sparring or boxing matches are to be held pursuant to the provisions of this act. Such deputy shall ascertain the exact conditions surrounding such match or contest and make a written report of the same in the manner and form prescribed by the commission. The commission may appoint, and at pleasure remove, a secretary to the commission, whose duty it shall be to keep a full and true record of all its proceedings, preserve at its general office all its books, documents and papers, prepare for service such notices and other papers as may be required of him by the commission and perform such other duties as the commission may prescribe. The commission may employ such clerical employees as may be actually necessary and fix their salaries within the amount appropriated therefor by the legislature. The secretary of the commission shall receive an annual salary of not

to exceed three thousand dollars. The salaries, necessary traveling and other necessary expenses of the members of the commission, and the salary of its deputies and secretary, shall be paid monthly by the state treasurer on the warrant of the state comptroller and the certificate of the chairman of the commission out of the money appropriated to be used therefor. Such matches or contests may be held in any building for which the committee in its discretion may issue a license. Where such match or contest is authorized to be held in state or city owned armory the provisions of the military law in respect thereto must be complied with. But no such match or contest shall be held in a building partly used for dwelling purposes or for religious services; except that a keeper or caretaker and his family may reside in such building. The commission shall annually make to the legislature a full report of its proceedings for the year ending with the first day of the preceding December and may submit, with such report, such recommendations pertaining to its affairs as to which it shall seem desirable.

SEC. 3. Boxing exhibitions authorized; jurisdiction of commisson; permits to corporations. Boxing and sparring matches or exhibitions for prizes or purses, or where an admission fee is received, are hereby allowed except on Sundays. The commission shall have and hereby is vested with the sole direction, management, control and jurisdiction over all such boxing and sparring matches or exhibitions to be conducted, held or given within the state of New York, and no such boxing or sparring match or exhibition shall be conducted, held or given

within the state except in accordance with the provisions of this act. The commission shall issue under its hand and seal, annual permits in writing for holding such boxing and sparring matches, *but only to corporations thereunto duly licensed,* as hereinafter provided, which said permits may be revoked upon violation of any of the provisions hereof, or any rule, regulation or order of the commission. [Italics ours.]

SEC. 4. License committee; terms; secretary; salary of secretary. The governor shall appoint and at pleasure remove a license committee, consisting of three persons, who shall hold office until their successors are appointed. Each member of the committee shall serve without compensation. The committee may appoint, and at pleasure remove, a secretary to the license committee, whose duty it shall be to keep a full and true record of all its proceedings, preserve at its general office all its books, documents, and papers, prepare for service such notices and other papers as may be required of him by the committee and generally to perform such other duties as the committee may prescribe. The secretary of the license committee shall receive an annual salary of not to exceed three thousand dollars, which shall be paid in like manner as the salaries and expenses of the commission. Such committee shall appoint such clerical employees as may be actually necessary and fix their salaries within the amount appropriated therefor by the legislature.

SEC. 5. Offices of committee; organization; rules; quorum. The committee shall maintain a general office in the city of New York, for the transaction of its business. The members of this license com-

mittee shall, at their first meeting after their appointment, elect one of their number chairman of the committee, shall adopt a seal for the committee and make such rules for the administration of their office, not inconsistent herewith, as they may deem expedient, and they may hereafter amend or abrogate such rules. A majority of the members of the committee shall constitute a quorum to do business, and the concurrence of a majority of such quorum shall be necessary to render a determination by the license committee.

SEC. 6. Jurisdiction of committee. The license committee is hereby given the sole control, authority, and jurisdiction over all licenses to hold boxing and sparring matches or exhibitions for prizes or purses or where an admission fee is received, and over all licenses to any and all persons who participate in such boxing or sparring matches or exhibitions, as hereinafter provided.

SEC. 7. License to corporations. The license committee may, in its discretion, issue a license to conduct, hold, or give boxing or sparring matches or exhibitions, subject to the provisions hereof, *to any corporation duly incorporated under the laws of the state of New York, but not otherwise.* Such corporation must hold a lease of a term of at least one year of the premises in which such match or exhibition is to be held. [Italics ours.]

SEC. 8. Corporations and persons required to procure licenses; professional boxer defined. All corporations, physicians, referees, judges, timekeepers, professional boxers, their managers, trainers and seconds shall be licensed by the said license committee, and no such corporation or person shall be permitted to participate, either directly

or indirectly, in any such boxing or sparring match or exhibition, or the holding thereof, unless such corporation or persons shall have first procured a license from the said license committee. For the purposes of this act, a professional boxer is deemed to be one who competes for a money prize or teaches or pursues or assists in the practice of boxing for a means of obtaining a livelihood or pecuniary gain, and any contest conforming to the rules, regulations and requirements of this act shall be deemed to be a boxing match and not a prize fight.

SEC. 9. Application for license; license committee to furnish list of licensees to commission. Every application for a license shall be in writing, shall be addressed to the license committee, shall be verified by the applicant, and shall set forth such facts as the provisions hereof and the rules and regulations of the committee may require. The license committee shall furnish the commission with the names and addresses of all persons and corporations receiving licenses.

SEC. 10. Subpœnas by boxing commission and license committee; oaths. The boxing commission shall have the authority to issue, under the hand of its chairman, and the seal of the commission, subpœnas for the attendance of witnesses before the commission, to the same effect as if they were issued in an action in the supreme court, and it may, by any member, administer oaths and affirmations and it may examine witnesses in all matters pertaining to the administration of the affairs of the commission; and disobedience of such subpœnas and false swearing before such commission shall be attended with the same consequences and be subject to the same penalties as if such disobedience or false

swearing occurred in an action in the supreme court. Like authority is hereby given to the license committee.

SEC. 11. Equipment of buildings for exhibitions. All buildings or structures used or intended to be used for holding or giving such boxing and sparring matches or exhibitions shall be properly ventilated and provided with fire exits and fire escapes, and in all manner conform to the laws, ordinances and regulations pertaining to buildings in the city, town or village where situated.

SEC. 12. Regulation of conduct of matches or exhibitions. No boxing or sparring match or exhibition shall be of more than fifteen rounds in length, such rounds to be not more than three minutes each; and no boxer shall be allowed to participate in more than fifteen rounds within twelve consecutive hours. The commission may in respect to any bout or in respect to any class of contestants limit the number of rounds of a bout within the maximum of fifteen rounds. At each boxing or sparring match or exhibition there shall be in attendance a duly licensed referee, who shall direct and control the same. Before starting a contest the referee shall ascertain from each contestant the name of his chief second, and shall hold such chief second responsible for the conduct of his assistant seconds during the progress of the contest. The referee shall have power in his discretion to declare forfeited any prize, remuneration or purse, or any part thereof, belonging to the contestants or one of them, if in his judgment, such contestant or contestants are not honestly competing. There shall also be in attendance two duly licensed judges who shall at the termination of each such boxing or sparring match or exhibition ren-

der their decision. If they are unable to agree, the decision shall be rendered by the referee. Each contestant shall wear, during such contest, gloves weighing not less than five ounces, if such contestant be a light weight or in a class of less weight and six ounces if such contestant be in a class heavier than the light weight class.

SEC. 13. Physician to be in attendance. It shall be the duty of every corporation, at its own expense, to have in attendance at every boxing or sparring match or exhibition, a physician who has had not less than three years' medical practice, whose duty it shall be to observe the physical condition of the boxers and advise the referee or judges with regard thereto.

SEC. 14. Age of participants and spectators. No person under the age of eighteen years shall participate in any boxing or sparring match or exhibition, and no boys under sixteen years of age shall be permitted to attend as spectators.

SEC. 15. Financial interest in boxer prohibited. No corporation shall have, either directly or indirectly, any financial interest in a boxer competing on premises owned or leased by the corporation, or in which such corporation is otherwise interested.

SEC. 16. Sham or collusive exhibitions. Every such corporation and the officers thereof, and any such physician, referee, judge, timekeeper, boxer, manager, trainer, and second, who shall conduct, give, or participate in any sham or collusive boxing or sparring match or exhibition shall be deprived of his license by the commission.

SEC. 17. Revocation or suspension of licenses. Any license herein provided for may be revoked or

suspended by the license committee for the reason therein stated, that the licensee has, in the judgment of the said committee, been guilty of an act detrimental to the interests of boxing.

SEC. 18. Bond. Before a license shall be granted to a corporation, such corporation shall execute and file with the state comptroller a bond in the sum of five thousand dollars, to be approved as to form and sufficiency of sureties thereon by the state comptroller, conditioned for the faithful performance by said corporation of the provisions of this act and the rules and regulations of the commission, and upon the filing and approval of said bond the state comptroller shall issue to said applicant a certificate of such filing and approval, which shall be by said applicant filed in the office of the license committee with its application for license, and no such license shall be issued until such certificate shall be filed. In case of default in such performance, the commission may impose upon the delinquent a penalty in the sum of not more than one thousand dollars for each offense, which may be recovered by the attorney general in the name of the people of the state of New York in the same manner as other penalties are recovered by law; any amount so recovered shall be paid to the state treasurer, as provided in section twenty-nine of this act.

SEC. 19. License fees. Each applicant for a license shall, before a license is issued by the license committee, and annually thereafter during the life of such license, pay to the license committee a license fee, as follows: corporations, in cities of the first class, seven hundred and fifty dollars; in cities of the second class, five hundred dollars; elsewhere, three hundred dollars; physicians, twenty-

five dollars; referees, twenty-five dollars; judges, twenty-five dollars; timekeepers, five dollars; professional boxers, five dollars; managers, twenty-five dollars; trainers, five dollars; seconds, five dollars.

SEC. 20. Weights; classes and rules. The weights and classes of boxers and the rules and regulations of boxing shall be the same as the weights and classes and rules and regulations adopted by the Army, Navy and Civilian Board of Boxing Control, Incorporated, and the International Sporting Club of New York, Incorporated.

SEC. 21. Limitation on difference in weight. No contest shall be allowed in which the difference in weight of the respective contestants shall exceed eighteen pounds. This provision shall not apply to boxers in the heavy and light-heavy weight classes.

SEC. 22. Payments not to be made before contests. No contestant shall be paid for services before the contest, and should it be determined by the judges and referee that such contestant did not give an honest exhibition of his skill, such services shall not be paid for.

SEC. 23. Examination by physician. All boxers must be examined by a licensed physician within three hours of his entering the ring.

SEC. 24. Report of medical examination. Every corporation shall file with the commission a report of medical examinations not later than twenty-four hours after the termination of a contest.

SEC. 25. Payments to state. Every corporation holding any boxing or sparring match or exhibition under this act, for which an admission is charged and received, shall pay to the state treasurer five per centum of the total gross receipts, exclusive of any federal taxes paid thereon. Such payment

shall be made within seventy-two hours after the holding of the contest.

SEC. 26. Tickets to indicate purchase price. All tickets of admission to any such boxing or sparring match or exhibition shall bear clearly upon the face thereof the purchase price of same, and no such tickets shall be sold for more than such price as printed thereon. It shall be unlawful for any such corporation to admit to such contest a number of people greater than the seating capacity of the place where such contest is held.

SEC. 27. Misdemeanor. Any person who directly or indirectly holds any such boxing or sparring match or contest except where all contestants are amateurs without first having procured a license as hereinbefore prescribed shall be guilty of a misdemeanor.

SEC. 28. Certain provisions of penal law inapplicable. The provisions of section seventeen hundred and ten of the penal law shall not apply to any boxing or sparring match or exhibition, conducted, held or given, pursuant to the provisions of this act, nor to any boxing or sparring match or exhibition in which all the contestants are amateurs.

SEC. 29. Appropriation. For the purpose of carrying into effect the provisions of this act for the fiscal year beginning July first, nineteen hundred and twenty, there is hereby appropriated, out of any moneys in the state treasury not otherwise appropriated, the sum of forty thousand dollars ($40,000), or so much thereof as may be necessary. All receipts of the license committee shall be paid over to the state treasurer.

SEC. 30. This act shall take effect immediately.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

THE UNITED STATES, Petitioner, vs. JAMES J. JOHNSTON, Respondent.	No. 415

RESPONDENT'S BRIEF.

The petition of the Government herein applies for a writ of certiorari to review the mandate of the Circuit Court of Appeals, Second Circuit, entered in the above cause, by which mandate the Circuit Court of Appeals reversed the judgment of the District Court for the Southern District of New York on a conviction on twelve counts of an indictment in which the respondent was charged with violations, in eight counts, of Sections 800, 802 and 1308 of the Internal Revenue Law, known as the Revenue Act of 1918, and in four counts with the crime of embezzlement.

Questions Involved.

The questions involved as stated by the Government are as follows:

1. Whether a corporation, because it holds a state license, is alone answerable for the payment of taxes on admissions to exhibitions, even though the liability of the corporation defeats the plain purpose of Congress to require the person receiving payment for admissions to collect the taxes and account for and pay them over to the Government.

2. Whether the tax moneys become the property of the United States the instant they are paid by the spectators to the persons in charge of admissions to exhibitions.

3. Whether the Court erred in holding that the statements contained in the Internal Revenue Bulletin constitute a regulation of the Treasury Department and have the force and effect of law.

Facts.

The Central Manhattan Boxing Club, Inc., secured a license from the New York State Boxing Commission to conduct boxing exhibitions at its clubhouse in New York City and the respondent, by contract, became its "agent, matchmaker and manager" for the period of one year, and agreed to pay the club the sum of Seven Hundred and Fifty Dollars ($750) a month except for the months of July and August "for the aforesaid ex-

clusive arrangement," agreeing to hold at least one boxing match each month. The indictment, it is significant to note, made no reference to such a contract or to the Central Manhattan Boxing Club, Inc., or to any arrangement between the club and respondent whatever. It proceeded on the theory that the boxing exhibitions were conducted by respondent; that he collected the admissions and the "Federal tax of one cent for each ten cents, or fraction thereof" paid or chargeable for admissions to such exhibitions and that his failure to account for such tax and pay same over to the Collector of Internal Revenue constituted a violation of the Revenue Act. The Circuit Court of Appeals in its opinion, from which we quote, stated the facts and legal result as follows:

> "The contract was not a mere renting of the premises. The corporation employed the services of Johnston as well. He paid a fixed sum as stated in the contract, which meant that the club was to obtain the first profits and be assured that they would reach a total sum of Seven hundred and fifty dollars a month. The nature of the business may have demanded that. Whatever may have been the foundation for this arrangement, it was the agreement of the parties. We think that the Federal tax should be paid, as was the State tax, by the corporation. In a legal sense, the box office receipts belonged to the principal or the employer of the plaintiff-in-error—the corporation. His collection of the admission money was as agent or manager with the vested interest as described in the contract. Therefore, the corporation owning the box office receipts became the custodian of the Federal tax collected to be subsequently paid to the Government. Within the purview of the New

> York statute permitting boxing exhibitions, he was not the conductor of the contests nor the collector of the money. It is not claimed nor proven that the plaintiff-in-error aided or abetted the corporation in the wilful failure to pay the tax."

The proof showed the assistant treasurer of the Central Manhattan Boxing Club, Inc., one Joe O'Brien, collected the admission fees and there was a total failure of proof that the respondent collected or touched a cent of money taken in at the boxing exhibitions, either for admission fees or as Federal tax.

The whole case went off and was reversed because the Court found that the corporation was custodian of the Federal tax collected and payable to the Government and, further, that the respondent neither aided nor abetted the corporation in its failure to pay or account for the tax.

It is true as to the third, sixth, ninth and twelfth counts of the indictment, in which respondent was charged with embezzlement, that the Court held, pursuant to a ruling of the Treasury Department (Internal Revenue Bulletin, Vol. I, No. 25, issued June, 1922), that the moneys collected as Federal tax did not become the property of the Government until it had been paid to the Collector of Internal Revenue and therefore that there could be no embezzlement of such funds.

The Revenue Act imposing the "tax of one cent for each ten cents or fraction thereof paid to any place for admission," provides (Sec. 502)

> "that every person, corporation, partnership or association receiving any payments * * * or collect the amount of the tax, if any, im-

> posed * * * and shall make monthly returns under oath, in duplicate, and pay the tax so collected to the Collector of Internal Revenue of the District in the principal office where place of business is located."

Section 1308 (d) defines the term "person" as used in the above section as follows:

> "The term person as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

It will be noted that respondent was neither an officer nor employee of the Central Manhattan Boxing Club, Inc. Nor was he under any duty to perform the act in respect of which alleged violations occurred.

Argument.

The Government asks first:

> "1. Whether a corporation, because it holds a state license, is alone answerable for the payment of taxes on admissions to exhibitions, even though the liability of the corporation defeats the plain purpose of Congress to require the person receiving payment for admissions to collect the taxes and account for and pay them over to the Government."

The answer to the question is obvious. There could have been no manipulation of the corporate affairs which would have relieved it, or some re-

sponsible person for it, from the responsibility to collect and account and pay the taxes imposed by the Government on admissions charged or chargeable to persons who attended the boxing exhibitions. If, by contract, the responsibility for this duty, primarily imposed on the corporation, could have been transferred to or imposed on any third person, all that the Government needed to have done would be to plead the facts and set out the contract, agreement or arrangement by which, or as a result of which, such novation was accomplished. If, on the other hand, the Government was not bound by any private arrangement of the parties, then the corporation and its officers chargeable with the collection of the tax and accountability for it would at all times remain responsible, both in civil and criminal proceedings. The difficulty in this case was that the prosecuting officers did not grasp this fact and proceed accordingly.

> "2. Whether the tax moneys become the property of the United States the instant they are paid by the spectators to the persons in charge of admissions to exhibitions.
>
> 3. Whether the court erred in holding that the statements contained in the Internal Revenue Bulletin constitute a regulation of the Treasury Department and have the force and effect of law."

In answer to questions 2 and 3, propounded by the Government, all that need be said is that the opinion of the Circuit Court of Appeals as to the property of the Government in taxes and moneys the instant they are paid by spectators was not decisive of the case, and whether or not this Court agrees with the Circuit Court of Appeals in hold-

ing (a) that the money doesn't become the property of the United States unless or until paid to the United States, and (b) that the ruling contained in the Internal Revenue Bulletin does not constitute a regulation of the Treasury Department having the force and effect of law, is immaterial for the same reason. If the Treasury opinion is not tenable, it seems that it is up to the Treasury Department to promulgate a new ruling. And it would seem that if the ruling, as the Government contends, "opens a door to fraudulent transactions," that the Treasury Department should see to it that the door is closed.

If there is any loophole in the Revenue Act as construed by the Treasury Department and by the Circuit Court of Appeals in this case, it is not the function of the courts to block it up, but is a matter for Congress to remove by amendment to the existing law.

Right to the Writ.

The right of the Government to prosecute an appeal, or writ of error, in criminal cases is governed by the Criminal Appeals Act of March 2, 1907 (Chap. 2564, 34 Stat. 1246). This act has never been held to extend the right of certiorari, permitting the Government to bring a writ of certiorari to this Court after a reversal of a judgment of conviction in a criminal case in the Circuit Court of Appeals, where the defendant below was convicted after trial by Court and jury as in the case at bar.

No case can be found by counsel in which this Court has ever granted a writ of certiorari to the

Government to review the judgment of the Circuit Court of Appeals reversing a judgment of conviction in any criminal case, after a trial thereof by Court and jury in the District Court.

The purpose of the Criminal Appeals Act is to grant to the Government the right to review the decisions of the lower Courts only in cases as set forth in the Criminal Appeals Act and therein specifically enumerated. Since said act is inclusive and no provision is made for a writ of certiorari by this Court directed to the Circuit Court of Appeals, where the Circuit Court of Appeals had reversed a judgment of conviction, this Court has no jurisdiction to entertain the petition filed by the Government.

Section 240 of the present Judicial Code in no way supersedes the Criminal Appeals Act, and in no way does it enlarge the right of the Government to appeal in the case at bar by certiorari or other means.

The limitations imposed upon the right of the Government of the United States to appeal by certiorari or otherwise to this Court, as contained in the Criminal Appeals Statute above referred to, are fully discussed in the case of *United States* v. *Keitel,* 211 U. S. 370, at page 398, wherein the Court, passing upon this question, stated as follows:

> "* * * that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower Court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms

> of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

To the same effect is the case of *United States* v. *Dickinson,* 213 U. S. 92, wherein this Court held that a writ of certiorari cannot be granted in a criminal case at the instance of the United States, regardless of what may be the supposed importance of the question involved.

The Court, further discussing the question, held, in substance, that the Act of March 2, 1907, quoted *supra,* giving the Government the right to appeal in certain criminal cases, could not be extended beyond its terms or construed so as to extend the power of certiorari to bring up for review a criminal case in this Court at the instance of the Government of the United States.

To issue a writ of certiorari on application of the Government of the United States, in the case at bar, would be to pervert the writ of certiorari to the purposes of a writ of error.

Respectfully submitted,

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Washington, D. C.,
Attorney for Respondent.

ARTHUR N. SAGER,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 111.

UNITED STATES

vs.

JAMES J. JOHNSTON, *Defendant.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE DEFENDANT.

THOMAS C. BRADLEY,
Attorney for Defendant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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JAMES J. JOHNSTON, *Defendant.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE DEFENDANT.

STATEMENT.

The defendant, James J. Johnston, was indicted September 9, 1921, on twelve counts, in eight of which he is charged with violations of Sections 800, 802 and 1308 of the Internal Revenue Law, known as the Revenue Act of 1918, and in four of which he is charged with embezzlement.

The proof shows that the defendant entered into a contract about November 26, 1920, with the Central Manhattan Boxing Club, Inc., to act as its "*agent, match-maker and manager—under its charter and license,*" for a period of one year. The Central Manhattan Boxing Club, Inc., was incorporated under the laws of the State of New York, and secured a license from the New York State Boxing Commission to conduct boxing exhibitions at its clubhouse located on 155th Street at Eighth Avenue.

The contract was received in evidence over objection (R. pp. 47-49), and is as follows:

> "For valuable consideration and the sum of One Dollar herewith paid in hand to each other by the parties to this agreement, the receipt whereof is hereby acknowledged, it is hereby agreed as follows:
>
> The party of the second part being desirous to exclusively conduct boxing contests as the agent, match-maker and manager of the Manhattan Athletic Club under the charter and license held by it for the period of one year from the date hereof, and the party of the first part being agreeable to such exclusive arrangement, it is understood by the parties hereto that the following arrangement shall hold good during the life of this agreement.
>
> The party of the second part agrees to pay to the party of the first part $750.00 a month, except that for the months of July and August the sum of $500.00 is to be paid, for the aforesaid exclusive arrangement.
>
> The party of the second part agrees to hold at least one boxing contest each month, and agrees to pay to the party of the first part $400.00 one week prior to the day set for each contest, and $350.00 on the evening of the contest, except that in July and August the sum of $100.00 is so pay-

able, or the said sums are due and payable in full on the last day of the month if no contest is held.

In the event of the postponement of any boxing contest from a date mutually agreed upon in any month, $250.00 is to be paid to the party of the first part by the party of the second part; and provided a later date in the same month or in the first week of the ensuing month may be had, for which the said sum of $750.00 is to be paid as above set forth.

It being at all times understood and agreed that the party of the second part agrees to hold a boxing contest each calendar month, so that if a contest is arranged for a particular day of a month and it is not held during that month or in the first week of the ensuing month, then and in that event the sum of $500.00 in addition to the aforesaid sum of $250.00 is due and payable to the party of the first part, or if no date for a contest is set in a month, then the sum of $750.00, except in the months of July and August when the sum of $500.00 is to be paid to the party of the first part for the aforesaid exclusive right herein given to the party of the second part.

The party of the second part also agrees to pay the State Tax of 5% and the Federal Tax of 10%.

It is further agreed that the party of the second part shall pay the premium of the bond to be given by the Club and the license fee of $750.00. The party of the second part agrees to reimburse the party of the first part for any monies necessarily paid out arising out of a penalty imposed by the Commission for the failure to comply with the rules and regulations of the Commission, or the provisions of the State Boxing Law, or in contesting any such proceeding or action brought by the Commission or any agent or employee of the party of the second part.

It is further understood and agreed that in the event of the party of the first part exercising its

power to terminate this contract, that it shall pay to the party of the second part the pro rata amount of the premium on the bond and license fee for the unexpired term of this contract.

More than one contest may be held in any one month and the sum of $500.00 is payable,—$400.00 in advance as above set forth, and $100.00 on the evening of the contest.

The party of the first part agrees in consideration of the above, to furnish the large hall of the Manhattan Casino, lighted and heated, and with seats, boxes and ring all arranged for a boxing contest, as heretofore used.

It is further understood and agreed that the ticket takers and ticket sellers employed by the party of the second part shall be paid by him and also the contestants and officials, *i. e.*, referee, phycians, time keepers, announcers, ushers, etc., and the necessary gloves and all other expenses incurred in the conduct of said contest shall be paid and furnished by the party of the second part.

It is further agreed that each contract or agreement made with contestants, officials, ticket sellers and other help employed by the party of the second part, shall specifically provide that payments of all moneys shall be made by the party of the second part and that he shall be solely responsible.

All dates for conducting boxing shows must be mutually agreeable to the parties hereto.

This contract shall remain in force during the life of the present license held by the Manhattan Athletic Club, Inc., but may be terminated by either party by the giving of ninety days' written notice.

The party of the second part is to have entire charge of the handling and selling of all tickets and shall have exclusive control of all complimentary and press tickets.

This contract is not assignable by the party of the second part.

It is hereby mutually agreed between the parties of the first part and the parties of the second part of this contract that the parties of the second part agree to deliver or to give to the parties of the first part as many complimentary tickets as is consistent with the amount permitted by the rules and regulations of the Boxing Commission of the State of New York, inclusive of three balcony boxes (two end—East side—one center) and one ring side box."

(Transcript, pp. 82 to 86.)

(R., pp. 47 to 49.)

Boxing exhibitions or contests were held by the Central Manhattan Boxing Club., Inc., during the running of this contract, on the following dates: February 28, March 10, March 24, March 31, April 13, May 3 and May 19, 1921, and it is for the alleged failure of defendant to account for and pay the taxes on "admissions" to said exhibitions that the indictment was brought.

THE INDICTMENT.

Counts 1, 2 and 3 (R. pp. 2-4) cover one exhibition or contest held in the month of February, with admissions of $6,180 and tax of $618. Counts 4, 5 and 6 (R. pp. 4-5) cover three exhibitions held in March, with admissions of $29,373 and tax of $2,937.10. Counts 7, 8 and 9 (R. pp. 6-7) cover one exhibition held in April, with admissions of $19,981.90 and tax of $1,998.10. Counts 10, 11 and 12 (R. pp. 7-8) cover two exhibitions held in May, with admissions of $8,505 and tax of $850.50.

The pleader in Counts 1, 4, 7 and 10 charges that defendant *"wilfully failed and refused to account for and pay over"* the sums of money due *as an excise tax* to the United States on the amount of money received as admissions paid to said exhibitions.

Counts 1, 4, 7 and 10 are based on alleged violation of Section 1308 (b), which is as follows:

> "(b) Any person who *wilfully refuses* to pay, collect, or truly account for and pay over any such tax, make such return or supply such information at the time or times required by law or regulation, or who wilfully attempts in any manner to evade such tax shall be guilty of a misdemeanor and in addition to other penalties provided by law shall be fined not more than $10,000.00 or imprisoned for not more than one year, or both, together with the costs of prosecution."

In counts 2, 5, 8 and 11 the defendant is charged with having *"failed to make a return to the Collector of Internal Revenue of the United States of money collected by him in payment of admissions to said exhibitions."*

Counts 2, 5, 8 and 11 are based on alleged violation of Section 1308 (a), which is as follows:

> "Sec. 1308. (a) That any persons required under Titles V, VI, VII, VIII, IX, X or XII, to pay or to collect, account for and pay over any tax, or required by law or regulations made under authority thereof to make a return or supply any information for the purposes of the computation, assessment or collection of any such tax, *who fails* to pay, collect, or truly account for and pay over any such tax, make any such return or supply any such information at the time or times required by law or regulation shall in addition to other penalties provided by law be subject to a penalty of not more than $1,000.00."

In Counts 3, 6, 9 and 12 he is charged with having *"unlawfully, knowingly and wilfully embezzled"* the sums of money representing the tax on admissions to the said exhibitions.

Counts 3, 6, 9 and 12 are based on alleged violation of Section 47 of the U. S. Penal Code, which is as follows:

> "Section 47. Whoever shall *embezzle*, steal or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

FACTS.

The proof tends to show that the Central Manhattan Boxing Club, Inc., was a corporation organized by Frank C. Hayden, Esq., a New York lawyer, with incorporators, stockholders, directors and officers selected or appointed by him personally (R. p. 23): that Hayden ran all the affairs of the Club without having his acts authorized or given corporate sanction. Hayden represented the Manhattan Casino and the Manhattan Athletic Corporation of America, Inc., respectively the owner and lessee of the premises on which the exhibitions were held. The Central Manhattan Boxing Club, Inc., was organizd by Hayden to take the lease and to procure a license from the New York State Athletic Commission to conduct boxing contests, a corporation being necessary to secure a boxing license as the law of the State of New York prohibited issuing such a lease to an individual. Johnston was made match-maker of the Club and entered into a contract in which he is designated as match-maker, agent and manager, and in that contract with the Central Manhattan Boxing Club, Inc., the amount of money which the Club was to receive and the number of contests to be held each month is set forth (R. pp. 47-49). Johns-

ton had no other status than that of match-maker, agent and manager of the boxing affairs of the Club, and was not an incorporator, stockholder, officer, director or employee. It further appears that one Joseph O'Brien acted as assistant treasurer of the Club with the consent of Hayden and the appointment was made on the authorization of Hayden (R. p. 18). Hayden not only authorized the designation of O'Brien to act as his assistant treasurer, but he actually recognized him as such in conducting the business of the Club with respect to the moneys to be paid to the Club and the Club's relations to the fights being held under its license. It is clearly shown in the proof offered at the trial of this case, that the Central Manhattan Boxing Club, Inc., made all reports as to moneys collected, admissions paid and free tickets to the State authorities and paid the 5% State tax due; that the Central Manhattan Boxing Club., Inc., conducted and ran the fights under its license and was the responsible party to the State Athletic Commission of New York.

The statement of the case set forth in the brief filed on behalf of the United States in so far as showing the charges upon which the defendant was tried and convicted and the course of the case through the various courts is substantially correct, and it is also true that no evidence was offered on behalf of the defendant. The statement is not correct as to the relations between the defendant and the Central Manhattan Boxing Club, Inc. It is stated in the Government's brief that the defendant was to pay to the Central Manhattan Boxing Club, Inc., a certain fixed sum as rent per month for the use of the Manhattan Casino and at no place in the contract between the parties is

the word "rent" used. In fact, the use of the word "rent" or of any language that would seem to create the relation of landlord and tenant appears to be studiously avoided. It is not true that the defendant conduced the boxing contests set forth in the indictment on his own behalf but did so as the "agent, matchmaker and manager of the Central Manhattan Boxing Club, Inc." (R. p. 47). In the statement of the case the Government is again in error where it is related on page five that the "defendant appointed as his assistant one J. M. O'Brien," who assumed (without any authority from the director) the title, assistant treasurer of the Club. This treasurer was not appointed without the authority of Frank C. Hayden, president of the Central Manhattan Boxing Club, Inc., but under his direct authority O'Brien was made assistant treasurer (R. p. 18). The United States contends that but two questions are involved in the case presented, and these will be first discussed in this brief. The following points will then be urged on behalf of the defendant:

POINTS OF LAW.

1. The indictment was fatally defective in that it wholly fails to charge any offense against the laws of the United States.

(A). The indictment fails to charge or set forth that there was any relation, contractual or otherwise, between the defendant and the Central Manhattan Boxing Club, Inc., which would render the defendant liable under the law to collect or make return of or pay over the taxes in question.

(B). Counts 1, 4, 7 and 10 are fatally defective for the following reasons:

(1). They fail to charge that the defendant either refused to collect the tax or that he retained the tax and refused to account for and pay over said tax.

(2). They allege that he collected the admission fees paid and erroneously charged it was considered excise tax on the same admission fees which he failed and refused to account for or to pay.

(3). They charge that he failed and refused to account for or to pay over certain sums, but wholly fail to allege—

(a) To whom.

(b) Where the tax was to be paid or when such payment or accounting must be made.

(C). Counts 2, 5 8 and 11 are fatally defective for the following reasons:

(1). They charge that the defendant failed to make a return of the "amount collected by him in payment of admissions" when no such duty is imposed by the Statute.

(2). They charge that the defendant failed to make return "to the Collector of the District in which the principal office or place of business is located," and merely charge that he failed to make a return "to the Collector of Internal Revenue of the United States."

(3). They charge that the defendant failed to make a return of the amount collected by him in payment of admissions but failed to allege when or where such return was to be made.

(D). Counts 3, 6, 9 and 12 are wholly defective for the following reasons:

(1). They fail to allege that defendant "*feloniously*" *appropriated* or converted the several sums to his own use.

(2). They fail to allege or set out—

(a) Any sort of agency, stewardship, or fiduciary relationship under which defendant acted and received the money, or

(b) That the money was entrusted to him and the purpose for which it was entrusted.

(c) The refusal of defendant to pay the money over to the United States.

2. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the Government and in permitting the witness Frank C. Hayden to testify over the objection of the defendant.

3. The money which the defendant is charged with having embezzled in Counts 3, 6, 9 and 12, was not money of the United States, but was simply money due the United States.

4. There was a fatal variance between the allegations of the indictment and the proof in that the Statute, in each count, charges that the boxing contests were conducted by the defendant, while the proof shows that they were all conducted by the Central Manhattan Boxing Club, Inc., under its charter and license from the State Athletic Commission.

5. The defendant was under no duty or obligation, nor was he one of the "persons" charged with the duty to pay, or to collect, account for, or pay over any tax or to make any return or supply any information for the purposes of computation, assessment, or collection of any tax under the provisions of the Revenue Law and particularly Title VIII of the Revenue Act of 1918.

6. The Court erred in failing to direct the jury to acquit at the close of the case as requested.

ARGUMENT.

The right of the Court to grant a writ of certiorari to the defendant in a criminal court is not denied by this defendant, for the reason that the Court has already acted and granted the writ, but it is contended on behalf of the defendant that the case presented is merely a moot one, for the reason that the mandate of the Court of Appeals directing a dismissal of the indictment has already been filed and become a matter of record on the dockets of the United States District Court before whom the defendant was tried and convicted.

The Government contends that the organization and incorporation of the Central Manhattan Boxing Club, Inc., was merely a subterfuge to permit Johnston to procure a license to hold boxing contests in New York City. This position is hardly sound, as it is hardly probable that Johnston would have permitted the Club to be run by Hayden with all the members of the board and the stockholders personal friends of Hayden's selected by him (R. p. 23), Johnston thus being without any opportunity to be heard through representation on the board of directors. But again, if it be assumed that Johnston did organize the Club and that the Club was run for his personal convenience, why can it not be equally and as forcibly assumed that Hayden was Johnston's attorney in all matters relating to the Club and that all the facts to which he testified at the trial of Johnston were privileged communications and information obtained by him while acting as attorney for the defendant. It is not true and the Record will not bear out the statement that it was "understood by all parties" that the contract between the Central Manhattan Boxing Club, Inc., and

Johnston was a lease under which Johnston was to pay to the Club a specified cash rent and the Record, pages 19 and 20, fails to bear out the Government's contention in that respect.

Whether or not Johnston agreed with the Club that he would pay both State and Federal taxes, and the Record shows that he did so agree (R. p. 48), the United States was not privy to this contract and on that assumption of responsibility alone the Government seeks to hold him liable for the collection of taxes under the Statute. In order to sustain the conviction in this case the Government cannot merely prove what was agreed to be done by the parties to the contract to which it was not privy, but must prove beyond reasonable doubt that Johnston did actually receive the moneys and did such other things as alleged in the indictment or required to be alleged in the indictment under the Statute. It is clearly a fact that he is under obligation to the Club, in addition to paying $750.00 per month, to pay all State and Federal taxes, but it does not mean that he was to pay them to the Government or that he was to collect them, but that he was merely to pay a sum equal to the State and Federal taxes to the Club. Certainly the Club cannot relieve itself of its responsibility to the United States by merely contracting with a third party that the third party will perform the obligations of the taxpayer and collector of taxes to the United States. Would it be seriously argued or contended by the Government in this case that the Central Manhattan Boxing Club, Inc., can by any contract relieve itself of accountability for these taxes or that an action to recover the taxes could not be maintained in a civil action? It is respectfully submitted that the

suggestion that such a proposition is tenable is ridiculous. And yet, if the Government's contention that Johnston is liable by reason of this contract to the United States for the collection and payment of these taxes, then by the same token the Central Manhattan Boxing Club, Inc., could not be held civilly or criminally liable.

It is further submitted that the learned Judge of the Circuit Court of Appeals was not compelled to rely upon the fact that the law of the State of New York recognized the Club alone as the only proper licensee to hold boxing contests in order to hold that Johnston could not be held liable for State taxes, for the reason that there is abundant evidence in the record that an officer of the Club, that is, the assistant treasurer, Joseph O'Brien, collected and handled all the money paid in at the box office by spectators at the boxing contests held by Johnston as match-maker of the Club (R. p. 14). Again it is clearly shown that the Central Manhattan Boxing Club, Inc., through its president, Frank C. Hayden, had entire charge of the receipt of the moneys, Hayden testifying as follows: "The Central Manhattan Boxing Club, Inc., as a corporation, and any of the affairs of that corporation or the *receipt of moneys,* I had entire charge of that; but so far as the *conduct* of these bouts was concerned, and all communications which were directed to the Club were given to Johnston" (R. p. 19). If it be required to show further that the Club itself was concerned not only with the collection of money agreed by Johnston to be paid to it under the contract, but also with making tax reports and returns, reference to the record (R. pp. 21 and 23) would show that Hayden, acting for the Club, handed the reports to the State Athletic

Commission within two days after the first bout. He testified as follows: "I superintended that myself, and E. O. Smith as secretary signed that statement, and it was brought to the Commission by myself personally —I had to go there."

Counsel for the United States lay great stress on the proposition that Johnston was under a duty imposed by a written contract to make the returns and pay the tax even if he was not a lessee of the place where the boxing contests were held and it is respectfully submitted that both these propositions fall and fail because, in the first place, the United States was not privy to the contract under which Johnston assumed the responsibility of collecting the taxes, and, secondly, that part of the contract was abrogated as soon as Hayden, acting for the Central Manhattan Boxing Club, Inc., *acquiesced* in and *authorized* the appointment of O'Brien as assistant treasurer of the Club (R. p. 18). The Central Manhattan Boxing Club, Inc., through Hayden, its president, not only authorized and sanctioned the appointment of O'Brien as assistant treasurer of the Club, but notified the Collector of Internal Revenue or the Federal "Government Officials" that there was an *assistant treasurer* who had collected the tax moneys (R. p. 24). Certainly, if the appointment of O'Brien as assistant treasurer, and the title itself implies an obligation to collect and handle moneys, the Club, through its proper officer, O'Brien, assumed the obligation to make reports to the Government and to pay over the taxes collected, if any, and thus relieved Johnston of that duty.

If it be held that the Revenue Act of 1918 places the duty of collecting the tax and making the returns upon

the person who collects the admission charges, then there is a total failure of proof to show that Johnston ever collected one penny of admission or one cent of taxes for the United States, or, in fact, that anyone ever collected any tax money for the United States for the bouts held under the license of the Central Manhattan Boxing Club, Inc. Certainly, if it cannot be shown beyond a reasonable doubt that Johnston did collect the tax, then his conviction on any count cannot stand.

The sixth proposition of law advanced by the Government is that the Circuit Court of Appeals erred in holding that the Internal Revenue Bulletins, Volume I, No. 25 (June 19, 1922), page 18, holding that taxes paid by spectators at a theater or other place of amusement was not property of the United States until actually paid into the Government, had the force and effect of law or amounted to a regulation. It would seem that this ruling does not violate the rule laid down in 290 Federal pp. 120-123, that Treasury Decisions addressed to and reasonably adapted to the enforcement of an Act of Congress have the force and effect of law if they be not in conflict with express statutory provisions, as it is one made pursuant to a regulation and is addressed to and reasonably adapted to the enforcement of the Revenue Act of 1918.

The mere notice printed upon the back of the Bulletin itself, advising that the information contained therein merely follows the trend of official opinion and is not a Treasury Decision, cannot change the fact that if it is a reasonable interpretation of the law and addressed to and reasonably adapted to the enforcement of an Act of Congress, it can be construed as having the force and effect of a law whether it be termed a Treasury Decision or not.

Under point eight the Government seeks to sustain the ruling of the trial court in overruling the objection made and Hayden's testimony, on the ground that he was Johnston's attorney and that his testimony necessarily involved a divulgement of privileged matter, but the statement of facts upon which the Government relies is erroneous and cannot be sustained by reference to the Record. There is nothing in the Record to show that Hayden was not acting as Johnston's counsel at any time except at the time the contract was signed and then only his statement and certainly this cannot, by any stretch of the imagination, be extended to cover the period covered by the indictment or the negotiations leading up to the signing of the contract. Indeed, Hayden testified, as a matter of fact, that he had represented Johnston as his attorney (R. p. 16), and the Record will not bear out the statement that the testimony given by Hayden was not knowledge gained by him as attorney for Johnston.

He was not a financial supporter of boxing contests and the Record is barren of any such evidence. How can it be said that Hayden was not representing Johnston in the making of the contract and not carrying out all the purposes for which the corporation was organized as Johnston's attorney when he himself testified that the corporation of which he was president and the directing head, that is, the Central Manhattan Boxing Club, Inc., was incorporated at Johnston's expense and for the purpose of getting a license to enable Johnston to conduct boxing contests, that Johnston paid the costs of incorporating, paid the license fee of $750.00, paid the costs of the bond which the corporation was obliged to enter into, and that the only reason the corporation was organized and

formed was that Johnston could get a license for the operation of a boxing club (R. p. 15). Can it be said that Hayden was not Johnston's attorney all of the time, that he was acting merely as a patron of the sport of boxing and, if so, why was he handling all the affairs of a corporation which he himself testified was organized by him to aid Johnston in having a license to hold boxing contests? Why is he accepting moneys from Johnston for organizing the corporation and why is he handling its affairs? We submit that the answer can be but one thing. That Hayden was Johnston's attorney during all the period covered by the indictment and for sometime prior thereto.

Further and beyond all this, the Government's contention that no confidential communications ever appeared to have been made to Hayden by Johnston and that a large part of the information imparted by Hayden on the witness stand was not derived from Johnston, or if he did learn anything from Johnston it was communicated to him in the presence of or with the knowledge of other persons, directors of the corporation, witnesses to the contract, etc., cannot be sustained by reference to the Record as no opportunity was given counsel for the defendant at the trial to do more than make the objection to Hayden testifying on the ground that he was divulging confidential matter that came to his knowledge by reason of the relation of attorney and client, for the Court immediately ruled flatly on the proposition of law that "the Government is not bound by that. That rule obtains in civil controversies. Of course, the Government, in a criminal prosecution, is not bound by that rule at all. The objection is overruled." (R. p. 12.) It is respectfully submitted that no opportunity was ever given counsel

to determine whether or not any or all of the testimony of Hayden was not matter within his knowledge by reason of communications made to him by the defendant Johnston, at a time when the relation of attorney and client existed between witness and the defendant, and at no place in the Record of Hayden's testimony is there any word to contradict this proposition or to sustain the proposition of the Government that the matter testified to was not obtained from Johnston or, if so, was communicated to Hayden in the presence of or with the knowledge of others.

I.

The indictment was fatally defective in that it wholly fails to charge any offense against the laws of the United States.

A.

It is not conceivable that a person or corporation owing a duty under the Revenue Law to collect and pay taxes to the Government can by contract shift that duty or obligation to another so that such other will be obligated to the Government and liable civilly and criminally for failure to carry out such contract. Such a contract may properly be made by the parties, but if made it is their responsibility as to its faithful performance. If A were proprietor of a theater, duly licensed and doing business, there is no reason why he should not, for reasons of his own, contract with B to operate the theater, under his license, and pay him a fixed sum weekly or monthly and in addition provide that B pay license, fees, fixed charges and expenses of entertainment and all State and Federal taxes. That was exactly what was done in this case.

But can it be said that by this contract A is relieved of liability to the Government either as to the collection or payment of the taxes and that the Government must look to B for satisfaction? To answer in the affirmative would be to open the door to fraud and permit a responsible party with property to substitute a totally irresponsible party in his stead and thus defraud the Government of large sums of money. But, assuming that the arrangement made by contract in this case absolved the Central Manhattan Boxing Club, Inc., of liability and imposed it on defendant, or, going further, that the arrangement made imposed on defendant the duty to collect, account for and pay the taxes and imposed on him the criminal liability without releasing the Central Manhattan Boxing Club in any way, and assuming that the assistant secretary-treasurer of the Club, appointed by Mr. Hayden, was the agent and representative of defendant, and in collecting or failing to collect the taxes in question he acted for defendant, the indictment presents no such theory and charges no facts upon which such a theory can be predicated.

We insist that by no argument or pleading, however ingenious, can defendant be held under the facts in this case to liability, civil or criminal, under the revenue laws. Even if it were shown that he actually and in fact personally collected the tax under the contract, he could not be held under the indictment in this case, for no such theory is presented and no allusion to such a contract or arrangement is made. He is charged as though he held the exhibitions as principal and there is no reference made to the Central Manhattan Boxing Club, Inc., or to any contract with that Club.

The Government and the Trial Court appreciated the essential importance of proving the contract (Exhibit 1), without which they had no possible theory on which to submit the case to the jury. The failure to plead the contract or charge the facts upon which the Government relied to support such a theory, we submit, renders the indictment a nullity.

B.

Counts 1, 4, 7 and 10 are fatally defective for the following reasons:

(1) The indictment in counts 1, 4, 7 and 10 attempts to charge a violation of Section 1308 (b). These counts, except as to dates and amounts, are identical and as all are characteristic and illustrate the defects and faults complained of, we will set out and address ourselves to count 1, which is as follows:

> "That heretofore, to wit, on the 31st day of March, 1921, in the Southern District of New York and within the jurisdiction of this Court, James J. Johnston unlawfully, knowingly and wilfully failed and refused to account for and pay over to the United States the sum of $618.00 being the amount of excise tax due and payable to the United States under the provisions of Title VIII of the Act of February 24, 1919, known as the Revenue Act of 1918, upon money received by the said James J. Johnston in payment of admissions, the said offense being more particularly described as follows:
>
> That on February 28, 1921, the said defendant conducted a boxing contest in the building known as the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, *and collected the admission fees paid by persons*

attending the said contest amounting to the sum of $6,180.00, and there was due to the United States under the provisions of the Revenue Act of 1918, upon the aforesaid amount as a tax thereon the sum of $618.00, and the defendant has 'unlawfully, knowingly and wilfully' failed and refused to account for or pay over the said sums; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sections 800, 802, and 1308 of the Internal Revenue Law.)" (Italics ours.)

Section 800 of the Revenue Act of 1918, as it applies, is as follows:

> "That from and after April 1, 1919, there shall be levied, assessed, collected and paid, in lieu of the taxes imposed by Section 700 (old act) of the Revenue Act of 1917—
>
> (1) A tax of 1 cent for each 10 cents or fraction thereof paid to any place for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying such admission."

Section 802 is as follows:

> "That every person (a) receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 800 or 801 from the person making such payments, or (b) admitting any person free to any place for admission to which a charge is made, shall collect the amount of the tax imposed by section 800 from the person so admitted. Every club or organization having life members, shall collect from such members the amount of tax imposed by section 801. In all the above cases returns and payments

of the amount so collected shall be made at the same time and in the same manner provided in section 502 (5513 herein)."

These sections provide (a) that *all persons that pay and secure admission* to any place where admissions are charged shall pay, in addition to admissions, a tax of 1 cent for each 10 cents or fraction thereof paid for admission, or (b) that, being admitted free to any place where admissions are charged, "*the person so admitted*" shall pay the amount of the tax and that in both instances the tax shall be collected by the person receiving any payments for admission or who admits any person free, and (c) that returns and payments of the amounts so collected shall be made as provided in Section 502. (Italics ours.)

Section 502 is as follows:

"That each person, corporation, partnership, or association receiving any payments referred to in section five hundred shall collect the amount of the tax, if any, imposed by such section from the person, corporation, partnership, or association making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under paragraph two of section five hundred and one *to the Collector of Internal Revenue of the district in which the principal office or place of business is located.* Such returns shall contain such information, and be made in such manner, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe." (Italics ours.)

It will be seen that it is the duty of the person securing admissions to pay the tax and the duty of the proprietor to first collect the tax and then pay it over to the Government. He is penalized by the Act, Section 1308 (b), if he fails to do either. *He cannot pay it in the first instance. He must collect it from the persons securing admissions, whether paid or free,* and it is not a tax on admissions paid but is a tax on "admissions" based on the price of the tickets, whether paid or free, by which "admissions" are secured. (Italics ours.)

In the counts under discussion (1, 4, 7 and 11) the indictment charges (1st) that the defendant wilfully failed and refused to account for the amount of *excise tax* due and payable to the United States upon money received in payment of admissions, and (2nd) that he collected the admission fees paid by persons attending the contest, amounting to $6,180, and that there was due the United States as a tax thereon the sum of $618, and that he wilfully failed and refused to account for or pay over said sum. All that can be said of this count of the indictment is that it charges that an exhibition was held at which $6,180 was collected in admissions and that there was due the United States *as an excise tax* thereon the sum of $618, which defendant wilfully failed and refused to account for or pay over. This is true of counts 4, 7 and 10, and in all and each there is a failure to charge that defendant *failed or refused to collect the tax or that he collected the tax and failed and refused to account for and pay it over.* These are the only offenses for which he could be held accountable under the Act.

(2) The law (Secs. 802, 502) provides that return and payment of the tax shall be made "monthly" to

the Collector of Internal Revenue of the district in which the office or place of business is located, and in this case, under the proof, the boxing exhibitions having been held at the Manhattan Casino, the return and payment should have been made to the collector of Internal Revenue of the district in which the casino is located.

But the indictment (counts 1, 4, 7 and 10) is silent as to all this and wholly fails to allege (a) to whom, or (b) where, or (c) when such payments or returns were to be made. It simply charges, in this exact language, that the defendant "*wilfully failed and refused to account for and pay over said sum.*" The supposition is that payments to be made to the United States are generally payable to the Treasury, but that is not alleged. Nor is it alleged to what officer of the Government or in what district payment was to be made.

Last, but of no less consequence is the failure to allege when returns and payments were to be made. The several counts of the indictment set the last day of the month named as the date of the offense of failure to make payment of the tax alleged to be due on admissions paid to contests held in the preceding calendar month, but it is not charged that the law required return and payments to be made on that or any other date. This is the conclusion of the pleader, but he nowhere, and in no way, charges that this was a requirement of the law, and that for failure to make return on or before said date, defendant was guilty of a violation of the Act. Whatever the requirement of the law and any regulations made thereunder, it should be pleaded in order to properly charge a criminal offense and fairly and reasonably advise a defendant of

the nature of the offense he is charged with having committed.

C.

Counts 2, 5, 8 and 11 of the indictment, based on Section 1308 (a) of the Act, charge that defendant "*unlawfully failed to make a return to the Collector of Internal Revenue of the United States of money collected by him in payment of admissions*" to boxing contests. (Italics ours.)

These counts of the indictment, except as to dates and amounts, are identical and so we will set out count 2 for the purposes of this argument. It is as follows:

> "And the grand jurors aforesaid on their oath aforesaid do further present heretofore, to wit, on the 31st day of March, 1921, in the Southern District of New York and within the jurisdiction of this Court, the above named James J. Johnston *unlawfully failed to make a return to the Collector of Internal Revenue of the United States of money collected by him in paymnt of admissions to a boxing contest* conducted by the defendant at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, City, County and State of New York, on February 28th, 1921, in violation of the Act of February 24, 1919, known as the Revenue Act of 1918, and that the defendant collected in payment of such admissions from the persons attending the said contest the sum of $6,180.00 *and in addition thereto the defendant collected $618.00 as taxes on said admissions;* against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided." (Secs. 800, 802 and 1308 of the Internal Revenue Law.) (Italics ours.)

(1) It is here urged that no return "*of money collected * * * in admissions*" to the boxing contest was required under the Revenue Act. What was required was a monthly return *of the amount of taxes collected* and payment of the tax collected to the Collector of Internal Revenue for the district in which the exhibitions were held.

Section 802 provides:

> "In all the above cases returns and payments of the amount so collected shall be made at the same time and in the same manner as provided in section 502 (5513 herein)."

Section 502 provides:

> "That every person, corporation, partnership or association receiving any payments * * * shall collect the amount of the tax, if any, imposed * * * and shall make monthly returns under oath, in duplicate, and pay the tax so collected * * * to the Collector of Internal Revenue of the district in which the principal office or place of business is located."

The only return required by the Act is the return of the amount of taxes collected, as provided in the sections above quoted. Yet the pleader charges and the Court permitted conviction for failure to make a return of the amount of admission fees collected.

As the law required that the tax be collected on all "admissions," paid or free, and as the reports to the New York State authorities (R. 51 to 72) (Government's Exhibits 3 to 18, inclusive) show that a large percentage of the "admissions" were free, it can readily be seen that to report merely the amounts "*of*

*money collected * * * in admissions''* would fall far short of serving any useful purpose. The requirement of the Act was, as stated, to make "returns of the amounts so collected (taxes) at the same time and in the same manner as provided in Section 502."

(2) These counts (2, 5, 8 and 11) are fatally defective in that they fail to allege failure to make a return *"to the Collector of Internal Revenue of the district in which * * * the place of business is located."* They do charge failure to make a return to "the Collector of Internal Revenue of the United States," but this does not satisfy or comply with the requirements of the statute. There are sixty-four Collectors of Internal Revenue of the United States and the same number of districts. The designation of the Collector of the proper district is obviously so essentially vital and its omission so manifestly fatal that argument is superfluous. (Italics ours.)

(3) The indictment also fails to allege where or when the returns were to be made. This point was discussed above under heading "B-2," and as the argument applies with equal force to the counts of the indictment here under consideration, we respectfully refer the Court to the discussion there found.

D.

We are come now to the "embezzlement" counts of the indictment. These counts (3, 6, 9 and 12) are identical except as to dates and the amounts alleged to have been embezzled.

Count 3 is as follows:

"And the grand jurors aforesaid on their oath aforesaid do further present, that heretofore, to wit, on the first day of April, 1921, in the Southern District of New York and within the jurisdiction of this court, the above named defendant, James J. Johnston, unlawfully, knowingly and wilfully embezzled the sum of $618.00, which was then and there money of the United States, in the following manner: to wit, the said defendant conducted a boxing contest on February 28, 1921, at the Manhattan Casino, 155th Street and 8th Avenue, Borough of Manhattan, New York City, and collected the sum of $6,180.00 in payment of admissions thereto and in addition as taxes upon the said admissions under the provisions of the Act of February 24, 1919, known as the Revenue Act of 1918, the defendant collected the sum of $618.00, representing a tax of one cent for every ten cents or fraction thereof paid by the various persons attending the said contest for admission thereto; *that the said sum of $618.00 was money of the United States and was collected by the defendant under the provisions of said Revenue Act of 1918, for and on behalf of the United States,* and it was the duty of the defendant to account for and pay over the said sum to the United States, *and the defendant unlawfully, knowingly and wilfully failed to pay the said sum to the United States and converted the same to his own use;* against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 47 of the Criminal Code)" (Italics ours.)

The offense of embezzlement here charged is not defined or created by Federal law. Section 47 of the U. S. Criminal Code merely provides that "whoever shall embezzle * * * money of the United States, shall

be fined not more than five thousand dollars, or imprisoned not more than five years, or both." The statute simply adopts and fixes a punishment for the offense of embezzlement at common law.

(1) The pleader in the embezzlement counts further fails to allege in what capacity the defendant came into possession of the moneys in question. The Act of March 3, 1875 (Sec. 47, Penal Code), under which this indictment was drawn, does not define the crime of embezzlement, and as said by Judge Trieber in *United States* v. *Allen*, 150 Fed. 152, it must be deemed by Congress to cover the offense of embezzlement as generally defined by the English and American Courts and statutes on that subject. In this case, the count in question was under the same Act and charged:

> "That he did then and there wilfully, feloniously and unlawfully embezzle and appropriate to his own use in substation 4 of the post office of the United States, located on Main Street, in the city of Little Rock, in the State of Arkansas, three hundred and eighty-three dollars money order funds of the United States of the value of three hundred dollars lawful money of the United States, a more particular description of which is to the grand jurors unknown contrary to the form of the statutes, etc."

The Court said:

> "As this count fails to show that he was an employe or that this money came lawfully into his possession by virtue of some employment, it is clearly bad.
>
> The identical question now before the court, under the same statute, was before the Supreme

> Court in Moore v. United States, *supra,* and it was there held that an indictment failing to allege that such sum came into defendant's possession in the capacity of a clerk or employee, although the indictment charged that he was such a clerk, was fatally defective. That decision is conclusive of this case, and for this reason the demurrer to the first count must be sustained."

In the instant case, there is no allegation of any relation or capacity whatever, nor any allegation that defendant was authorized to collect the taxes for the United States. The pleader does allege "*that the said sum * * * was money of the United States and was collected by defendant under the provisions of the Revenue Act of 1918, for and on behalf of the United States, and it was the duty of the defendant to account for and pay over the said sum to the United States,*" *etc.* But there is no allegation that he was an employee, servant or agent of the United States in the matter of the collection of the money, or that he was authorized to collect it, and the whole allegation is a conclusion of the pleader that he collected the money "*for and on behalf of the United States.*"

The Treasury Department, by Regulation 43-1, Article 35, *supra,* has held that the money collected as admissions tax is not the property of the Government until paid to the Government,and evidently Congress had that in mind when it provided for payment by those who procured admissions, and collection and accounting by the proprietor, with drastic criminal penalties for failure of either to comply with the Act (Sec. 1308-b). Had it in mind the idea of constituting the exhibitor or proprietor of the place of amusement its agent, it

would have included such a provision in the Act and in that event, if the moneys collected as taxes had been stolen as in the case passed upon which brought the ruling just referred to, the United States and not the theater owner would have suffered the loss. It is evident that the Government placed itself in position to at all times call for a full accounting for the money due it under the Act.

Under the facts in this case, defendant was not the proprietor or owner of the place of amusement and, under the law, it was not his duty, as the indictment charges, to collect the admission taxes and pay and account for same to the Government. Whatever responsibility he may have assumed or may have been imposed on him was by virtue of the contract (Government Exhibit 1) and there is no allegation in these counts, or any others, of this contractual obligation, if such can be imposed and be binding on him and the Government.

In *Moore v. United States*, 160 U. S. (1st Cir.) 273, 274, the Court, in passing on an indictment under the same statute, said:

> "'The ordinary form of an indictment for larceny is that J. S., late of, etc., at, etc., in the county aforesaid (specifying the property), of the goods and chattels of one J. N., 'feloniously did steal, take, and carry away.' In other words, the whole gist of the indictment lies in the allegation that the defendant stole, took and carried certain specified goods belonging to the person named. The indictment under consideration is founded upon a statute to punish larcenies of government property. It applies to 'any person,' and uses the words 'embezzle, steal, or purloin' in the same connection, and as applicable to the same persons

and to the same property. There can be no doubt that a count charging the prisoner with stealing or purloining certain described goods, the property of the United States, would be sufficient, without further specification of the offense; but whether an indictment charging in such general terms that the prisoner 'embezzled' the property of the government (identifying it), would be sufficient, we do not undertake to determine; although we think the rules of good pleading would suggest, even if they did not absolutely require, that the indictment should set forth the manner or capacity in which the defendant became possessed of the property.

For another reason, however, we think the indictment in this case is insufficient. If the words charging the defendant with being an employee of the post office be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless and might even be misleading, since the defendant might be held for property received in a wholly different capacity—such, for instance, as a simple bailee of the government. In the absence of a statutory regulation the authorities upon this subject are practically uniform. Whart. Crim. L. 1942; Rex v. Snowley, 4 Car. & P. 390; Com. v. Simpson, 9 Met. 138; People v. Sherman, 10 Wend. 298, 25 Am. Dec. 563; Rex v. Prince, 2 Car. & P. 517; Rex v. Thorley, 1 Mood. C. C. 343; Rex v. Bakewell, Russ. & R. 35."

The indictment simply charges that defendant embezzled the sum of $618 in money of the United States in the following manner:

(a) By collecting $618, a tax imposed under the revenue Act;

(b) By unlawfully, knowingly and wilfully *failing* to pay that sum to the United States;

(c) By converting same to his own use.

There is no allegation as to his duty to collect the money or the capacity (whether as agent or employee) in which he collected same.

There is no allegation that he *refused* to pay the money over to the Government. The allegation is that "*the defendant unlawfully, knowingly and wilfully failed to pay the said sum to the United States.*"

There is no allegation that he *wilfully, knowingly, unlawfully or feloniously* appropriated or converted the money to his own use.

All the authorities hold that there must not only be a relation of confidence and trust between the person appropriating property and the owner to constitute embezzlement, but the appropriation must be with a fraudulent intent. The mere breach of contract, or a mere neglect to pay over funds, is not sufficient (*Clark's Criminal Law*, p. 275).

(2) It is here contended that the indictment as to these counts is fatally defective in that it fails to use and employ the word "feloniously" in describing and charging the offense. The Act itself does not define the crime of embezzlement, and for this reason must be deemed to have been enacted to cover the offense of embezzlement at common law, or as defined by the English statutes on that subject. There are no less than twenty different sections of the United States Statutes that create and define the crime of embezzlement (see Index, U. S. Criminal Code), such as embezzlement "of coins by officers of mints," "by Cus-

todians of public property," "of mail matter," etc., and indictments have been sustained as to these statutes which could not have been upheld under the test at common law. But Section 47, upon which the indictment in the instant case is founded, adopts the common law felony of embezzlement and by the terms of the punishment prescribed continues it as a felony under the Federal law and it therefore must be tested by the rules of pleading at common law.

There are no common law offenses against the United States and Federal Courts cannot take cognizance of crimes except such as are created by the Congress (*United States* v. *Greve*, 65 Fed. 487). But when Congress punishes an offense by designation without defining it, the Courts look to the common law for the definition and elements of the offense, and test indictments by the rules and principles that govern at common law (*In re Greene*, 104 Fed. 111; *United States v. Cardich*, 143 Fed. 640, 642-643).

In *United States v. Cadwallader*, 59 Fed. 677, it is held that embezzlement was a common law offense. Blackstone in his Commentaries, Vol. 4, pp. 230-231, defines embezzlement as "the appropriation to one's own use or benefit of property or money entrusted to him by another, such as the embezzlement by clerks, servants, and agents of their employers' money or property." Judge Putnam, in the First Circuit, in *Jewett v. United States*, 100 Fed. (1st Cir.), p. 837, speaks of "embezzlement at common law" in discussing what would be sufficient to charge that crime.

In the case of *United States* v. *Greve*, 65 Fed. 487, Judge Priest, in passing on the question raised in a case of embezzlement of national banking funds, said:

"At this time, and upon the brief consideration I have been able to give the subject, I am not prepared to hold that the indictment must charge that the embezzlement or conversion was felonious. *It would unquestionably be the safest practice. It is seriously debatable whether an indictment omitting that word or its necessary and full equivalent is not defective.* The federal courts, it is true, do not deal in their criminal jurisdiction with common law offenses. They only recognize such as are created and defined by Congress within its constitutional authority. However, in the enactment under consideration, Congress has employed the word 'embezzlement,' and being technical, it must bear in the context that technical signification which it has usually borne, and if it be a complex or component word, comprehending in the form of definition an offense, in charging such an offense by indictment the several elements must be separated, and specifically averred. Embezzlement, in its technical sense, and with respect to such punishment as the statute under consideration prescribed, most usually means a felonious appropriation by a servant of his master's property while it is in his keeping; and 'feloniously' means with a deliberate intent to do a wrongful act. It is true, the indictment here charges that the embezzlement was done with 'the intent then and there to injure,' etc., but this does not express precisely the same meaning as 'feloniously,' because in the latter the element of deliberation is embraced. There would be no tautology in using both expressions." (Italics ours.)

The distinguished jurist who rendered that opinion was passing on a statute which created an entirely new and distinct offense, and it is evident that the serious doubt he expressed as to sufficiency of the indictment in that case would have been a settled conviction had

he considered the same question under Section 47 of the Penal Code.

In the case of *United States v. Staats*, 49 How. 41, 12 Law. Ed. 979, where the exact point was raised and at issue, it was held that in *all felonies at common law*, the felonious intent is an essential ingredient of and descriptive of the crime. In this case the Court said:

> "In all cases of felonies at common law, and some, also by statute, the felonious intent is deemed an essential ingredient in constituting the offense; and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adherred to with great strictness; and properly so, where this intent is a material element of the crime.
>
> This view accounts for the necessity of the averment of a felonious intent in all indictments for felony at common law; and, also, in many cases when made so by statute; because, if it is used, in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed, and not the degree of punishment, the felonious intent is of the essence of the offense; as much so as the intent to maim, or disfigure, in the case of mayhem, or to defraud, in the case of forgery, are essential ingredients in constituting these several offenses."

Again, in the case of *Bannon & Mulkey* v. *United States*, 156 U. S. 464, the same point was at issue and the Court clearly distinguished between crimes created by statute and those which at common law were felonies and said (1st Cir.—p. 467), in speaking of the ruling of the Court in *United States* v. *Staats, supra,* that:

> "In the opinion it was admitted that in cases at common law, and some also by statute, the felonious intent was deemed an essential ingredient, and the indictment would be defective, even after verdict, unless such intent was averred."

And again, in *Myers v. United States,* 256 Fed. 779, the Circuit Court of Appeals (5th Cir.) holds to the distinction as between offenses created by statute and those at common law.

The weight and reason of all the authorities which have any application is that offenses not created by statute must be charged in language which fully covers every essential ingredient of the offense. Felonious intent is essential to all common law felonies and particularly so to larceny and embezzlement because of the very nature of the crimes and the possibility of innocent taking or appropriation. It cannot be argued that the use of the words "unlawfully, knowingly and wilfully" are the equivalent of "feloniously," for they are not used in connection with the conversion which is the gravamen of the offense. They are employed in connection with the alleged failure to pay the money to the United States, which does not constitute the crime charged.

The crime of embezzlement under Section 47 is a felony and if due regard and weight is to be accorded the case of *United States* v. *Staats, supra,* the indictment must be held fatally defective because of the omission to charge that the act of embezzlement was feloniously done.

II.

The Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the Government and in permitting the witness Frank C. Hayden to testify over the objection of the defendant.

A.

It is first urged that the Court erred in admitting the contract (Government Exhibit 1) in evidence over the objection of the defendant (R., pp. 12-13). The purpose of the contract was to fasten on defendant some responsibility for the collection of taxes on admissions to the boxing exhibitions given and held in the name of the Central Manhattan Boxing Club, Inc., under its charter and license. It was impossible to show that defendant held any such exhibitions and therefore impossible to show that as exhibitor (the person contemplated by the statute) he was responsible to the Government for the collection of the taxes paid by persons admitted. To overcome this, counsel for the Government, the witness Hayden and the Trial Court ably and zealously collaborated and worked to make such a connection. The indictment was silent as to existence of the Central Manhattan Boxing Club and silent as to the existence of a contract of any kind. It failed to allege the existence of such a relationship between the Club and defendant as was sought to be established by the contract. We have no record of what was said in the opening statement of counsel for the Government, but as soon as the witness Hayden developed the fact *that there was such a thing as the Central Manhattan Boxing Club, that it conducted the boxing contests, and*

that the defendant was its "matchmaker" (fols. 65, 68), the Court immediately asked: "What was his relation?" The witness thereupon undertook to define the relationship of the two under the contract; in other words, to interpret the contract (R., p. 12). It was then admitted over the objection of the defendant (R., p. 12). Throughout the examination of this witness the labor was to shift the responsibility on defendant, and to "cap the climax" the Court asked this question: "Under this contract, as I understand it, Johnston had full control?" and the witness answered: "Absolutely; we had nothing to do with it at all."

We, who are on this brief, have labored assiduously to find some precedent directly in point but without success and it must be because of the fact that never before in the history of criminal jurisprudence has there been such a departure from the rudimentary principles of evidence in the conduct of a case. The veriest tyro in the law knows that evidence must conform to the pleadings in a case and that the rule is even more rigidly applied in criminal cases than it is in civil proceedings. Yet, without pleading the facts or even an allegation of ultimate fact or conclusion of law, this contract between private parties was permitted to go into evidence to establish a criminal liability. The error was egregious and would if sustained establish a dangerous precedent in the trial of the citizen for his liberty.

B.

At page 12 of the record, objection was made to the further testimony of the witness Hayden on the ground that to permit it would be violating a confidence as to

the knowledge that came to him by reason of the professional relation of attorney and client existing between the witness and defendant. To this objection, the Court in ruling said:

> "The Government is not bound by that. That rule obtains in civil controversies. *Of course, the Government, in criminal prosecution is not bound by that rule at all.* The objection is overruled."

The objection was timely. It came at a time when the witness was undertaking, and was later permitted to testify to the relation of defendant to the Central Manhattan Boxing Club. Later (R., p. 16) he testified that he was attorney for the Manhattan Athletic Club, the Central Manhattan Athletic Club, the Manhattan Casino, and defendant. Obviously, he could have testified, without prejudice, to many things under a proper ruling of the Trial Judge and would have been prevented from testifying as to those matters that came to his knowledge through his employment by defendant. This would have excluded much of the most damaging testimony given by the witness, as we will presently attempt to show. But the ruling of the Court precluded such a practice. It was a complete and sweeping denial of the right of a defendant in a Federal Court to enter any objection to the introduction of privileged communications growing out of the relation of attorney and client. Further insistence or repeated objections on this score would have been useless and might properly have invited the reprimand of criticism of the Court—a thing counsel always tries to avoid, not only to spare his own feelings but to avoid prejudice to his client's cause.

It has been difficult for us to understand this ruling by a judge of the ability of Judge Van Fleet and we are of necessity forced to re-examine and present the Federal cases to fortify our understanding of the law.

In the case of *Lew Moy v. United States,* 237 Fed. 50, the defendant interposed an objection to the testimony of a lawyer to whom he had gone for the purpose of engaging him professionally and who declined the employment. The Court, among other things, said:

> "Whatever was in Mr. Clark's mind, the situation was peculiarly one inviting Hee's trust and confidence. Mr. Clark was an attorney at law, practicing in the state where the trial was to be had. It was properly desirable for defendant Hee, who lived in a distant state to have the aid of local counsel, especially Mr. Clark, who was already counsel for one of his co-defendants. The subject of their conferences was manifestly of a character covered by the immunity from enforced disclosure. The statements made were not by way of confession, nor in casual discourse with an outsider. In questions of this kind consideration should be given to the attitude, the intent and belief, of the person seeking advice or assistance. For example, communications have been excluded when made to a detective who falsely pretended to be an attorney at law. People v. Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. See also State v. Russell, 83 Wis. 330, 53 N. W. 441.
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> Communications made in good faith to an attorney at law for the purpose of obtaining his professional advice or assistance are privileged. The payment of a fee is not essential. Alexander v. United States, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954. Nor does it matter that after the communications the attorney declines to act. Strong

v. Dodds, 47 Vt. 348; Sargent v. Hampden, 38 Me. 581; Thorp v. Goewey, 85 Ill. 611; Cross v. Riggins, 50 Mo. 335; Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848. There is some diversity of opinion upon this question, but the above is better sustained by sound principle. It is in accord with the common custom of those who seek professional advice. The man who goes to the lawyer does so as a client, and the lawyer who listens to him does so professionally. The communications preliminary to actual retainer or engagement are frequently necessary, and they should be unconstrained and without apprehension of disclosure. That this should be so is of public interest, and is essential to the intelligent and honorable practice of the law. Various obstacles to a definite contractual relation may appear from the communications—prior inconsistent duty to others, ethical professional standards, time and opportunity, disagreement as to compensation, and so on—but generally the preliminary conference must be had, and the disclosures made are within the spirit of the immunity. The fair and reasonable operation of the admitted general rule requires that liberality of construction."

In the case of *York v. United States*, 224 Fed. 88, the Court said:

" 'The general rule,' said Mr. Justice Story in Chirac v. Reinicker, 11 Wheat. 278, 294, 6 L. Ed. 474, 'is not disputed that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even

if they wish, to disclose; and the law holds their testimony incompetent. The real dispute in this case is whether the question did involve the disclosure of professional confidence.' And that is the question in the case at bar. Indispensable elements of a privileged communication between attorney and client are: (1) The professional relation of attorney and client at the very time the communication is made (Harless v. Harless, 144 Ind. 196, 41 N. E. 592, 594; Brady v. State, 39 Neb. 529, 532, 533, 58 N. W. 161; Farley v. Peebles, 50 Neb. 723, 728, 70 N. W. 231; Turner's Estate, 167 Pa. 609, 610, 31 Atl. 867); (2) the making of the communication on account of that relation (Chirac v. Reinicker, 11 Wheat. 278, 294, 6 L. Ed. 474); and (3) the necessity or relevancy of the communication to the subject-matter of the attorney's engagement, in order to enable him to use his ability, skill, and learning in the discharge of his office of attorney in relation thereto. 1 Greenleaf on Evidence (16th Ed.) 244; Jones on Evidence (2nd Ed.) 751; Denunzio's Receiver v. Scholtz, 117 Ky. 182, 77 S. W. 715, 716, 4 Ann. Cas. 529."

The cases quoted from and cases cited in the opinions all jealously guard any confidence given to an attorney under circumstances which show the existence of a professional relation or the anticipation of one. The only relaxation from the rule we are able to find is that where the confidence is given or advice is sought with the intention of committing a crime or in cases where third parties were witness to what occurred.

In this case, because of the total denial and repudiation of the right to invoke the rule in a Federal Court, we have nothing to guide us as to what testimony of the witness would or would not have been excluded by its proper application. Certainly, the inferences can-

not be charged against the defendant. By all rules of justice and right, they should be broadly and liberally applied in his favor. The fact that no one can tell what harm befell him by such a ruling is sufficient in furtherance of justice to warrant the reversal of the case, if no other reason appears in this record. The vicious, voluntary statement he made following a ruling of the Court (R., p. 25), that "Johnston and his assistant sold the tickets and collected the tax," which is the only thing that indicated that the tax was collected by them, or either of them, illustrates most forcefully the injury that may have been done by the ruling. It may be urged that he had other sources of knowledge and ways of finding this out. But there is nothing to show that he did. In fact, he says (R., p. 14) that all his money transactions were with O'Brien. Again (R., p. 19), he said: "*Well, the Central Manhattan Boxing Club, as a corporation, in any of the affairs of the corporation or the receipt of moneys, I had charge of that; but so far as the conduct of these bouts were concerned and all communications which were directed to the club, they were given to Johnston.*" And in his letter (defendant's Exhibit A, R., p. 24), he says over his signature: "the taxes were collected and paid to the assistant treasurer and matchmaker and the moneys if not paid are still held by them." If this statement is true, the Club and not O'Brien or Johnston, collected the taxes. But more to be criticized is his testimony as to the relations of Johnston and O'Brien. He was permitted to testify throughout that O'Brien was the agent or assistant of defendant and this information he could not have acquired except from defendant. The Court on objection refused to let him testify that O'Brien told him that he was the agent of defendant (R., p. 15).

This, of course, was the proper ruling, but throughout he spoke of O'Brien as the agent or assistant of Johnston and both he, the District Attorney, and the Court stressed that relationship. It was a necessary thing to establish and well appreciated by these three able lawyers, the District Attorney, the Trial Judge and the witness.

We insist it was improperly done for the reasons here urged and for the further reason urged elsewhere, that without the necessary allegations of such a relationship in the indictment, or the existence of such a contract, the proof was wholly incompetent, irrelevant and immaterial.

III.

The money which the defendant is charged with having embezzled in counts 3, 6, 9 and 12, was not money of the United States, but was simply money due the United States.

Courts take judicial notice of the regulations of departments charged with the administration of Acts of Congress, and in the absence of judicial interpretation, give such regulations controlling weight (*John F. Malley, Collector, v. Walter Baker & Co.*, 281 Fed. 41). The Court in that case said:

> "But it is elementary that, if ambiguity is found in a statute or when it is necessary to determine a fact upon which the operation of a statute is made to depend, the regulations made by the department charged with the administration of the Act are to be given great, sometimes practically controlling, weight.
>
> See Edwards, Lessee, v. Darby (12 Wheat. 206, 212; Houghton v. Payne (194 U. S. 88, 96); Ko-

mada v. United States (215 U. S. 392; Jacobs v. Pritchard (223 U. S. 200, 214); Houston v. St. Louis Independent Packing Co. (249 U. S. 479); Noble v. Union River Logging R. R. Co. (147 U. S. 165; Coopersville Co-op. Creamery Co. v. Lemon (163 Fed. 145); United States v. Healey (160 U. S. 136, 141); Robertson v. Downing (127 U. S. 607, 613). Cf. American Casualty Co. v. United States (251 U. S. 342, at 349), where the court, by Mr. Justice Clarke, said:

'It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an Act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provisions.' Citing United States v. Grimaud (220 U. S. 506); United States v. Birdsall (223 U. S. 233, 251); United States v. Smull (236 U. S. 405, 409, 411); United States v. Moorhead (243 U. S. 607.)"

In respect of the question as to the ownership of money collected as taxes on admissions, the Treasury Department has decided that, until the tax has been paid to the Collector of Internal Revenue, the tax is not the property of the United States.

This regulation is found in Internal Revenue Bulletin, Vol. I, No. 25, issued June 19, 1922, at page 18, and is as follows:

"TITLE VIII.—TAX ON ADMISSIONS AND DUES.

Collection, Return, and Payment of Tax.

Section 802, Regulations 43-1, Article 35: Duty to collect, return, and pay tax. I-25-360, S.T. 377.

Inquiry has been made whether theater admissions tax in the amount of $112.15 included in a

larger amount stolen from the safe of a moving-picture theater was the property of the Government so as to relieve the theater owner from payment to the Government of the amount of tax so stolen. It is assumed that the transactions occurred subsequently to January 1, 1922, so as to be governed by the provisions of the Revenue Act of 1921.

Section 800 of the Revenue Act of 1921 imposes a tax on the amount paid for admission to any theater, the tax to be paid by the person paying for such admission. Under the provisions of sections 802 and 502, returns and payment of the tax to the collector of internal revenue are to be made monthly; certain penalties and interest are imposed by those sections for failure to pay the tax when due. Section 1302 provides for the imposition of various penalties for failure to pay, collect, truly account for, and pay over certain taxes, including the admissions tax.

In the opinion of this office, the law imposes upon the theater owner the duty to make returns and pay the tax to the collector of internal revenue. *The obligations so imposed are not complied with until the tax has been so paid. Accordingly, the $112.15 collected as admissions tax was not the property of the Government at the time it was stolen.*"

The sections referred to above are identical with those of the Act of 1918.

Under this regulation, the tax alleged to have been collected by defendant and embezzled by him, in counts 3, 6, 9 and 12 of the indictment, was not property of the United States and the conviction on these counts cannot stand.

But the Court did not look to the law or to the regulations and did not attempt to construe or interpret

them. On the contrary, the Court and the District Attorney took the law of the case from Joseph Steinberg, Deputy Collector. We quote from his examination, without comment (R., pp. 43-44).

"*Redirect examination by Mr. McCoy.*

Q. Mr. Steinberg, when a form of that sort that you have just mentioned is not filed, what does that amount to; is it a violation? A. It would be a violation, positively.

Q. Is it serious?

The Court: Does the law require it, or the regulations?

The Witness: The regulations require it; we would call it a technical violation, and it carries a fine of $10 or so on the part of the party who fails to file it.

Q. But, in any event, the law specifically says, or the regulations specifically say, that the one who collects the tax, actually receives the money, is the one who is responsible for paying that tax? A. Yes, that party would be responsible for the payment of that tax.

Q. Regardless of whether any notice has been given to the Bureau of Internal Revenue, as to whether a lessee is in charge of a building? A. Regardless of that fact.

The Court: I suppose, under the law, as soon as this tax is collected, the tax being a separate thing from the admission fee, as soon as that tax is collected by anyone, it is property of the United States.

The Witness: It is the property of the United States. There are certain taxes to be collected by parties specified under certain sections of the law; in fact, they really become agents of the Govern-

ment for the collection of that tax, and the tax on admissions is one of those. There were several others; for instance, the tax on transportation.

Q. And the luxury tax is another? A. Section 904, I think it is.

The Court: And whoever collects those taxes becomes an agent of the Government?

The Witness: Really become an agent of the Government. That is proven by the fact that if that party is unable to collect the tax, the Government will aid him, and, in fact, collect it for him.

By Mr. McCoy.

Q. But as soon as he collects that tax it never becomes his money, does it, it is always the Government money? A. It is the Government's money. There is a corresponding duty on the part of the party who is paying for admissions also to pay that tax, and if he refuses to pay it he is violating the law. * * *

The Court: But the failure to pay the tax makes the party receiving it responsible to the Government.

The Witness: The party collecting the tax is the one responsible to the Government—now, what is your question, please?"

IV.

There was a fatal variance between the allegations of the indictment and the proof in that the Statute, in each count, charges that the boxing contests were conducted by the defendant, while the proof shows they were all conducted by the Central Manhattan Boxing Club, Inc., under its charter and license from the State Athletic Commission.

The mere statement of this point carries its own argument. Defendant did not, and could not, under the New York State law, conduct a boxing exhibition or contest. Licenses for such exhibitions could only be granted to chartered clubs whose application for license met the requirements of the law and the regulations of the New York State Athletic Commission. The Central Manhattan Boxing Club, Inc., did secure such license on its application Def. Ex. B. (R., pp. 74 to 76), and it, under this license and sanction of the Athletic Commission, not defendant, held and conducted the exhibitions. As "agent, manager and match-maker," defendant could act and the contract contemplated he should so act for the Central Manhattan Boxing Club in the "*conduct of boxing contests * * * under its charter and license held by it for a period of one year.*" At least, he did so act and unless there was some regulation of the Boxing Commission to the contrary, there is no legal reason why such an arrangement could not be entered into and the conduct of the contests delegated to an agent.

But the Club, licensed by the State Athletic Commission, held the contests, reported to the State authorities, paid taxes to the State authorities, and according to the proof, the Club, not defendant, failed to

make reports and returns to the Collector of Internal Revenue. Government Exhibits 3 to 18, inclusive (Record, pp. 51-72), are reports made by it to the Treasurer of the State of New York and the New York Athletic Commission on official forms and they cover each and all of the contests alleged in the indictment to have been held.

Mr. Frank C. Hayden testified (R. p. 11) that the Central Manhattan Boxing Club conducted the boxing contests. It could not have been done in any other way and while it is conceivable that by proper pleading a case might be charged against defendant under the Revenue Act and that the proof adduced in this case supplemented with proof, wholly lacking in this case, that the taxes were in fact collected, might sustain such an indictment.

V.

The defendant was under no duty or obligation, nor was he one of the "persons" charged with the duty to pay, or to collect, account for, or pay over any tax or to make any return or supply any information for the purposes of computation, assessment, or collection of any tax under the provisions of the Revenue Law and particularly Title VIII of the Revenue Act of 1918.

The Central Manhattan Boxing Club, Inc., under the statute, owed the duty to collect the tax and account for same and no delegation of that duty by contract or otherwise can alter the fact or the law.

Section 1308 (d) contemplates holding certain individuals responsible for the obligations of corporations charged with the duty to collect, account for and pay

over the tax provided by Section 800 of the Revenue Act of 1918.

It is as follows:

> "The term 'person' as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

Defendant, however does not come within the classification of that section. He was neither "*an officer or employee*" of the Central Manhattan Boxing Club, nor as such "*under a duty to perform the act*" in respect to which the violations occurred.

Neither was the defendant a lessee, which under the regulations of the Internal Revenue Department might bring him in the category of those responsible for the payment of the taxes. Even if it be conceded that the defendant might be properly charged and held responsible for failure to collect and account for taxes for the exhibitions or contests held by the Central Manhattan Boxing Club, Inc., it is urged that the indictment as drafted on which defendant was arraigned and tried does not set forth facts which make him responsible for any of the alleged violations of the Revenue Act.

VI.

The Court erred in failing to direct the jury to acquit at the close of the case as requested.

The proof wholly failed to establish the offenses charged in the several counts of the indictment.

(1) The evidence showed that the Central Manhattan Boxing Club, Inc., not defendant, conducted the boxing exhibitions.

(2) The evidence failed to show that defendant collected the tax in question and failed to make return or pay same to the United States. The inquiry and proof was entirely and exclusively as to the failure of the Central Manhattan Boxing Club, Inc., to make such return and payment.

(3) The evidence as to counts 2, 5, 8 and 11 wholly failed to show that defendant failed to make a return to the proper revenue officer of the amount of admissions collected (although this is no offense), and the inquiry and proof was entirely and exclusively as to the failure of the Central Manhattan Boxing Club, Inc., to make such return.

(4) The money alleged to have been embezzled was not money of the United States.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

THOMAS C. BRADLEY,
Attorney for Defendant.

UNITED STATES *v.* JOHNSTON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 111. Argued April 30, 1925.—Decided, May 11, 1925.

1. Under the provision of the "Revenue Act of 1918," taxing admission fees, (Feb. 24, 1919, c. 18, § 800, 802, 40. Stat. 1057, 1120,) a person who has collected such fees at a public exhibition and is required to pay the tax to the United States is a debtor and not a bailee; so that failure to pay the tax is not indictable as an embezzlement of money of the United States, within § 47 Criminal Code. P. 226.
2. A person who collects admission fees to boxing matches is liable to punishment under § 1308b of the above Revenue Act for failure to pay the taxes to the United States, if he really acts on his own behalf in giving the exhibitions, collecting the fees and undertaking to pay taxes, even though, to comply with a state law, the exhibitions are given nominally by a corporate licensee of which he is technically but the agent. P 227.

290 Fed. 120, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a sentence of the District Court in a criminal prosecution for failure to pay over admission fees taxes, and for embezzlement.

Mr. William J. Donovan, Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States.

This Court has jurisdiction to grant certiorari at the suit of the Government in a criminal case. It is not

necessary to argue this proposition at length, as it is presumed that the Court considered the matter when it passed upon the petition for certiorari (263 U. S. 692), and when it granted a similar petition at the suit of the Government (*United States* v. *Gulf Refining Co.*, 262 U. S. 738). It is sufficient to submit that the former holding in *United States* v. *Dickinson*, 213 U. S. 92, is not now an authority to the contrary, in view of the significant changes which have been made in the statute since that case was decided. Act of March 3, 1911, c. 231, § 240, 36 Stat. 1087, 1157, amending the Act of March 3, 1891, c. 517, § 6, 26 Stat. 826, 828. An examination of the committee reports, and of the statements made by committee members upon the floor of the Senate, clearly shows that the framers of that section of the Judicial Code intended that the United States should be permitted to bring up criminal cases from the Circuit Court of Appeals by certiorari. The section was, in fact, amended during its passage through the Senate, in order to accomplish that result. Cong. Rec. 61st Congress, 3rd Sess., vol. 46, part 3, p. 2134; vol. 46, part 4, pp. 3762, 4000, 4001.

The Club was formed and the license procured at Johnston's request, at his expense, and for his benefit. The sole reason for its existence is to be found in the provision of the state laws which permitted only incorporated clubs to hold boxing licenses. The whole device was merely a subterfuge to permit Johnston to do indirectly through the medium of a corporation what the state law prevented him from doing directly as an individual. One may be liable criminally for acts done under the cloak of corporate existence, even though the corporation is a separate entity. *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, 274; *In re Reiger*, 157 Fed. 609; *Wood* v. *United States*, 204 Fed. 55, 58. In this case, however, it is submitted that the acts charged

in the indictment were from the beginning to end the direct acts of the defendant Johnston alone. The contract between the Club and Johnston was in reality nothing more nor less than a lease to the defendant of the Manhattan Casino for a specified cash rent, and was so understood by all parties. Johnston, as lessee, controlled all the arrangements for the contests, sold the tickets, and collected the tax. Johnston had agreed with the Club that he would pay both state and federal taxes. His assistant, O'Brien, actually did pay the state tax in full, submitting over his signature the reports required by the state Treasurer. But neither he nor anyone else took any steps toward paying over the federal tax to the Collector of Internal Revenue. The Revenue Act of 1918 requires that the tax shall be paid by the spectators and collected by the person who receives the payments from the spectators. The Act looks to the person who is in actual control of admissions. Treas. Dep. Int. Rev. Reg. 43, part 1, Art. 64, p. 98, approved January 26, 1921. Even if it be held that the Club was also liable for the tax, the defendant Johnston was none the less properly convicted. Even assuming that the Club failed to account for the taxes, it was not necessary to charge that Johnston had aided or abetted in the failure. Under § 1308 (d), and § 332 of the Penal Code, he could be charged as a principal.

A collector of tax moneys is not a debtor to the United States; he is a bailee. *United States* v. *Thomas*, 15 Wall. 337, 352. The amount of this tax is kept separate from the price of admissions; and the regulations of the Treasury Department require that the price of admission, the amount of the tax, and the total of admission plus tax be printed as separate items on every ticket sold. It is submitted that the clear purpose of both the law and the regulations is to impose upon the person collecting admissions the capacity *quoad haec* of a govern-

ment agent. He is the instrumentality through which the United States takes the tax directly from the spectators. The case is not analogous to that of income or other taxes of that nature. The collector of entertainment taxes stands upon a different footing. The tax is not upon him; it is upon the spectator. His duty is to collect the tax from the spectator. He collects it, and it comes lawfully into his possession, as the agent of the United States; and if he converts it to his own use, he commits the crime of embezzlement. *Grin* v. *Shine*, 187 U. S. 181; *United States* v. *U. S. Brokerage & Trading Co.*, 262 Fed. 459; *Schell* v. *United States*, 261 Fed. 593.

Mr. Thomas C. Bradley, for respondent.

The purpose of the Criminal Appeals Act is to grant to the Government the right to review the decisions of the lower courts only in cases therein specifically enumerated. Since that act is inclusive and no provision is made for a writ of certiorari by this Court directed to the Circuit Court of Appeals, where the Circuit Court of Appeals had reversed a judgment of conviction, this Court has no jurisdiction to entertain the petition filed by the Government. Section 240 of the present Judicial Code in no way supersedes the Criminal Appeals Act, and in no way does it enlarge the right of the Government to appeal in the case at bar by certiorari or other means. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Dickinson*, 213 U. S. 92.

The indictment is fatally defective in that it wholly fails to charge any offense against the laws of the United States. It is not conceivable that a person or corporation owing a duty under the Revenue Law to collect and pay taxes to the Government can by contract shift that obligation to another so that the other will be obligated to the Government and liable civilly and criminally for failure to carry out such contract. Such a contract may

properly be made by the parties, but if made it is their responsibility as to its faithful performance. If A were proprietor of a theater, duly licensed and doing business, there is no reason why he should not, for reasons of his own, contract with B to operate the theater, under his license, and pay him a fixed sum weekly or monthly and in addition provide that B pay license-fees, fixed charges and expenses of entertainment and all state and federal taxes. That was exactly what was done in this case. But can it be said that by this contract A is relieved of liability to the Government either as to the collection or payment of the taxes and that the Government must look to B for satisfaction? To answer in the affirmative would be to open the door to fraud and permit a responsible party with property to substitute a totally irresponsible party in his stead and thus defraud the Government of large sums of money. Even if it were shown that he actually and in fact personally collected the tax under the contract, he could not be held under the indictment in this case, for no such theory is presented and no allusion to such a contract or arrangment is made. He is charged as though he held the exhibitions as principal and there is no reference made to the Central Manhattan Boxing Club, Inc., or to any contract with that Club. The failure to plead the contract or charge the facts upon which the Government relied to support such a theory, we submit, renders the indictment a nullity.

Sections 800 and 802 of the Revenue Act of 1918 provide (a) that all persons that pay and secure admission to any place where admissions are charged shall pay, in addition to admissions, a tax of 1 cent for each 10 cents or fraction thereof paid for admission, or (b) that, being admitted free to any place where admissions are charged, " the person so admitted " shall pay the amount of the tax and that in both instances the tax shall be collected by the person receiving any payments for ad-

mission or who admits any person free, and (c) that returns and payments of the amounts so collected shall be made as provided in § 502. It will be seen that it is the duty of the person securing admissions to pay the tax and the duty of the proprietor to first collect the tax and then pay it over to the Government. He is penalized by the Act, § 1308(b), if he fails to do either. He cannot pay it in the first instance. He must collect it from the persons securing admissions, whether paid or free, and it is not a tax on admissions paid, but is a tax on "admissions" based on the price of the tickets, whether paid or free, by which "admissions" are secured.

The only return required by the Act is the return of the amount of taxes collected, as provided in the sections quoted above. Yet the pleader charges and the Court permitted conviction for failure to make a return of the amount of admission fees collected. As the law required that the tax be collected on all "admissions," paid or free, and as the reports of the New York State authorities show that a large percentage of the "admissions" were free, it can readily be seen that to report merely the amounts "of money collected . . . in admissions" would fall far short of serving any useful purpose. The requirement of the Act was, as stated, to make "returns of the amounts so collected (taxes) at the same time and in the manner as provided in § 502."

The offense of embezzlement here charged is not defined or created by federal law. Section 47 of the Criminal Code merely provides that "whoever shall embezzle . . . money of the United States, shall be fined," etc. The statute simply adopts and fixes a punishment for the offense of embezzlement at common law. *United States* v. *Allen*, 150 Fed. 152. In the indictment, there is no allegation of any relation or capacity whatever, nor any allegation that defendant was authorized to collect the taxes for the United States.

The Treasury Department, by Regulation 43–1, Art. 35, has held that the money collected as admissions tax is not the property of the Government until paid to the Government, and evidently Congress had that in mind when it provided for payment by those who procured admissions, and collection and accounting by the proprietor, with drastic criminal penalties for failure of either to comply with the Act (§ 1308–b).

The money which the defendant is charged with having embezzled, was not money of the United States, but was simply money due the United States. Int. Rev. Bulletin, Vol. I, No. 25, June 19, 1922, p. 18.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The respondent, Johnston, was convicted on an indictment charging in separate counts a failure to pay over the tax upon admission fees received at certain boxing matches and a failure to make return to the collector of internal revenue of the money so received, contrary to the Act of February 24, 1919, c. 18, §§ 800, 802, 1308(b); 40 Stat. 1057, 1120, 1143. He also was convicted under § 47 of the Criminal Code of embezzling the amounts collected as taxes on the same occasions. Act of March 4, 1909, c. 321, § 47; 35 Stat. 1097. The judgment was reversed and the District Court was directed to dismiss the indictment by the Circuit Court of Appeals. 290 Fed. 120. A writ of certiorari was granted by this Court as the decision was said to be of grave importance to the administration of the revenue laws. 263 U. S. 692.

So far as the charge of embezzlement goes we think that the Court below and the intimation of the Treasury Department that it followed were clearly right. However it may have been under other statutes (*United States* v. *Thomas*, 15 Wall. 337) it seems to us that under this law the person required to pay over the tax is a

debtor and not a bailee. The money paid for the tax is not identified at the outset but is paid with the price of the ticket that belongs to the owner of the show. We see no ground for requiring the ticket office of a theatre to create a separate fund by laying aside the amount of the tax on each ticket and to keep it apart, either in a strong box or as a separate deposit in a bank. Reports are required only once a month, §§ 802, 502, which does not look as if the Government were dealing with these people otherwise than with others answerable for a tax. Further argument seems unnecessary upon this point.

On the other counts we are of opinion that the Court below was wrong. We do not grant a certiorari to review evidence and discuss specific facts. But the Court seems to have regarded the formal relations of Johnston to the Central Manhattan Boxing Club, Inc., made necessary by the laws of New York, as conclusive upon his relations to the United States. The laws of New York permitted a license only to a corporation and so Johnston may have assumed the technical position of agent and manager for the Club. But if as a matter of fact all this was machinery to enable Johnston to give exhibitions, collect the entrance fees and make himself liable for the tax, it properly might be alleged that he collected the fees and if he wilfully failed to pay that he refused and failed to pay the tax. As the jury found Johnston guilty, although with an earnest recommendation of mercy, we are of opinion that the sentence and judgment of the District Court, which was much less than it might have been under § 1308(b), must be affirmed.

Judgment of the Circuit Court of Appeals reversed.
Judgment of the District Court affirmed.